2016 IL App (1st) 110793-UC

FIFTH DIVISION
January 6, 2017

No. 1-11-0793

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 CR 9162
	)	
TAMAR MOORE,	)	
	)	Honorable
Defendant-Appellant.	)	Sharon M. Sullivan,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Vacating defendant's aggravated unlawful use of a weapon convictions and remanding the matter to the trial court for sentencing on defendant's unlawful use of a weapon by a felon conviction in light of *People v. Burns*, 2015 IL 117387, and *People v. Mosley*, 2015 IL 115872.

¶ 2 Following a bench trial, defendant Tamar Moore was found guilty of two counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (2), (a)(3)(A), (d) (West 2010)) and one count of unlawful use of a weapon by a felon (UUWF) (720 ILCS 5/24-

1.1(a), (e) (West 2010)). After merging the counts into one, the trial court sentenced defendant to three years and six months of imprisonment on count I for AUUW (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d) (West 2010)). In his initial appeal, defendant contended: (1) the State failed to prove his guilt beyond a reasonable doubt because the officers' testimony was not credible; and (2) his conviction under the AUUW statute violated his second amendment rights of the United States Constitution (U.S. Const., amend. II). This court initially affirmed defendant's conviction, finding: (1) the trier of fact could have reasonably found the arresting officers' testimony credible; and (2) the AUUW statute was constitutional. *People v. Moore*, 2013 IL App (1st) 110793. The Illinois Supreme Court subsequently entered a supervisory order directing us to vacate our judgment and reconsider our opinion in light of *People v. Aguilar*, 2013 IL 112116. *People v. Moore*, No. 115935 (Ill. Jan. 29, 2014). Upon further examination, we reaffirmed defendant's conviction. *People v. Moore*, 2014 IL App (1st) 110793-B. Thereafter, our supreme court entered another supervisory order directing us to vacate our judgment and reconsider our opinion in light of *People v. Burns*, 2015 IL 117387. *People v. Moore*, No. 117919 (Ill. Jan. 20, 2016). With additional consideration, we vacate defendant's convictions for the AUUW offenses, affirm his conviction for the UUWF offense, and correct the mitimus.

¶ 3 BACKGROUND

¶ 4 The State charged defendant by information on May 19, 2010, with two counts of AUUW and one count of unlawful use of a weapon by a felon. The State based the charges on police testimony that defendant, a previously convicted felon, possessed a loaded and concealed handgun while in public.

¶ 5 At a bench trial, the State presented the testimony of Sergeant Michael Saladino (Saladino) and Officer Bjornn Millan (Millan) of the Chicago police department. Both officers

testified that early in the morning on May 6, 2010, they were patrolling the intersection of North Avenue and Mayfield Avenue on the west side of Chicago. The Chicago police department sent Saladino, Millan, and Officer Joseph Plovanich (Plovanich) to survey the area after receiving numerous complaints about violent activity originating from a social club operating near the intersection. The officers observed the intersection from their respective marked squad cars, which were parked next to each other on North Avenue.

¶ 6 At approximately 4:15 a.m., the officers observed a group of men congregating at the southeast corner of the intersection. The group then began moving south down Mayfield Avenue. Millan and Plovanich turned left on Mayfield and drove south to investigate. Saladino turned his vehicle around to improve his line of sight, stopping in the intersection and facing south approximately 50 to 75 feet away from the group. Saladino testified that after Millan and Plovanich passed defendant, he observed defendant stop in front of a tall bush, reach into his waistband with his right hand, and pull out a handgun. According to Saladino, defendant dropped the weapon and kicked it under the bush. Millan and Plovanich then stopped and exited their vehicle, approaching the group. Millan testified he observed defendant appear from under the bush to rejoin the rest of the group. While Saladino and Plovanich secured all of the members of the group, Millan searched the bush, where he recovered a loaded semiautomatic pistol.

¶ 7 Based on the testimony establishing the foregoing facts, the trial court found defendant guilty on all counts. At a subsequent hearing, the trial court merged counts II and III into count I, sentencing defendant on AUUW (720 ILCS 5/24-1.6(a)(1), (d) (West 2010)).

¶ 8 ANALYSIS

¶ 9 I. Reasonable Doubt Claim

¶ 10 Defendant argues the trial judge could not have found him guilty of the charges beyond a reasonable doubt because the testimony used to convict him was "inherently unbelievable." When a defendant challenges the sufficiency of the evidence, as defendant does here, the reviewing court must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). This court will not reverse a decision by the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of the defendant's guilt. *Id.*

¶ 11 According to defendant, the idea that he would remove a weapon from his person in the vicinity of the police belies common sense; in other words, no one would ever be so foolish and, therefore, there must be some reasonable doubt as to whether the officers testified truthfully. To the contrary, we find defendant's actions are consistent with the situation that he found himself in—that is, being pursued by law enforcement—and hardly improbable. Indeed, a criminal opting to dispose of contraband after becoming aware of a police presence is not only believable, but also common. See, *e.g.*, *California v. Hodari D.*, 499 U.S. 621, 623 (1991) (while being pursued by officers, defendant tossed away a bag of crack cocaine); *United States v. Ryerson*, 545 F.3d 483, 486 (7th Cir. 2008) (incarcerated defendant requested from prison to have his friend dispose of the machine gun hidden in his garage before the police discovered it); *People v. Comage*, 241 Ill. 2d 139, 142 (2011) (after officers arrived in parking lot, defendant ran away and threw drug paraphernalia over a fence); *In re M.F.*, 315 Ill. App. 3d 641, 643-44 (2000) (upon hearing police knock and announce their presence, defendant exited the apartment through a window and began to throw bags of cocaine towards the street).

¶ 12 According to the testimony of Saladino and Millan, they observed defendant and his

group from their marked police vehicles from a short distance away. It is certainly believable that defendant—aware of both nearby law enforcement and of the fact that he was illegally in possession of the weapon—attempted to rid himself of the firearm before the officers had an opportunity to detain him. Millan and Plovanich had passed defendant on the street and defendant never turned around to see that Saladino had changed his position. With no evidence to suggest defendant realized Saladino had a direct view of his abandonment of the weapon, a rational trier of fact could conclude defendant decided he could safely and quickly abandon the weapon at this point without being detected. Moreover, contrary to defendant's assertions, the fact that he used his right hand to accomplish this task, despite being left handed, does not make the officers' account any less credible. Accordingly, we do not find defendant's argument that the officers' testimony is "inherently unbelievable" persuasive.

¶ 13 Defendant further contends police officers frequently fabricate stories (referred to as "dropsy" testimony) of criminal suspects conveniently dropping evidence in plain view of a police officer in order to circumvent the search and seizure restrictions of the fourth amendment. See *People v. Ash*, 346 Ill. App. 3d 809, 816 (2004) ("A 'dropsy case' is one in which a police officer, to avoid the exclusion of evidence on fourth-amendment grounds, falsely testifies that the defendant dropped the [evidence] in plain view ***."). According to defendant, false "dropsy" testimony is commonplace and has become a pervasive problem that threatens the legitimacy of the justice system. Defendant supports this claim with various newspaper and law review articles that either directly or indirectly comment on the phenomenon. These reports allegedly establish the widespread nature of false "dropsy" testimony, thereby undermining the officers' version of events. In short, defendant argues because police frequently invent such stories, Saladino and Millan cannot reasonably be believed.

¶ 14 Even assuming, however, that this anecdotal evidence actually establishes a trend or problem, it does little to discredit the officers' testimony in this case. It does not follow that because other police officers have falsified similar testimony in the past that reasonable doubt has been conclusively established here. At best, such evidence suggests one would be wise to consider the frequency of police perjury as a factor when judging credibility. Such evidence does not, however, compel the trier of fact to disbelieve any officer's testimony that describes witnessing a defendant dropping or abandoning contraband. See, *e.g.*, *People v. Gustowski*, 102 Ill. App. 3d 750, 753-54 (1981) (discrepancies in the officers' testimony pertaining to the defendant's dropping of contraband were insufficient to render the trier of fact's credibility determination unreasonable).

¶ 15 After considering all of the evidence in this case, the trial judge found the officers to be credible. The trier of fact is the sole judge of credibility at trial and defendant has not established the trial court's determination was so improbable and unreasonable that we must reverse. *People v. Hernandez*, 278 Ill. App. 3d 545, 552 (1996). Viewing the evidence in a light most favorable to the prosecution, the trial judge reasonably could have found the elements of the crime of either AUUW or UUWF established beyond a reasonable doubt. *Evans*, 209 Ill. 2d at 209.

¶ 16 II. Second Amendment

¶ 17 In his initial brief, defendant argued his conviction under the AUUW statute violated his right to keep and bear arms under the second amendment of the United States Constitution, relying on *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Section 24-1.6 of the AUUW statute provides in relevant part:

> "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:

(1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business *** any pistol, revolver, stun gun or taser or other firearm; or

(2) Carries or possesses on or about his or her person, upon any public street, alley, or other public lands within the corporate limits of a city, village or incorporated town, except when an invitee thereon or therein, for the purpose of the display of such weapon or the lawful commerce in weapons, or except when on his or her own land or in his or her own abode *** or fixed place of business, any pistol, revolver, stun gun or taser or other firearm; and

(3) One of the following factors is present:

(A) the firearm possessed was uncased, loaded and immediately accessible at the time of the offense[.]

***

(d) Sentence.

(1) Aggravated unlawful use of a weapon is a Class 4 felony; a second or subsequent offense is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years.

***

(3) Aggravated unlawful use of a weapon by a person who has been previously convicted of a felony in this State or another jurisdiction is a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 7 years." 720 ILCS 5/24-1.6 (West 2010).

¶ 18 In *Burns*, our supreme court considered a constitutional challenge to section 24-1.6(a)(1), (a)(3)(A) of the AUUW statute. *Burns*, 2015 IL 117387, ¶ 19. Our supreme court noted that in *Aguilar*, it held that the provision was facially unconstitutional because it impermissibly infringed on the rights granted by the second amendment to the United States constitution. *Id.* ¶ 15. The court stated that, regardless of whether a defendant is sentenced as a Class 4 offender of a Class 2 offender, the law was facially invalid and that it was "not enforceable against anyone." *Id.* ¶¶ 24, 32. Accordingly, we vacate defendant's conviction and sentence for AUUW under section 24-1.6(a)(1), (a)(3)(A).

¶ 19 Defendant was also found guilty on count II pursuant to section 24-1.6(a)(2), (a)(3)(A) of the AUUW statute, which charged that defendant knowingly carried or possessed on or about his person a firearm, on a public street within the city of Chicago, which was "uncased, loaded and immediately accessible." The charge further alleged defendant was not on his own land or in his own abode or place of business at the time of the offense. After the parties provided supplemental briefs to this court, section 24-1.6(a)(2), (a)(3)(A) of the AUUW statute was also found to be unconstitutional in *People v. Mosley*, 2015 IL 115872, ¶ 25. Although the defendant in *Mosley* was sentenced as a Class 4 offender, in light of our supreme court's subsequent opinions in *Aguilar* and *Burns* and in the interest of judicial economy, we conclude the class of the offense has no bearing on the constitutionality of the AUUW statute and, therefore, we vacate defendant's conviction of AUUW under count II. See *Aguilar*, 2013 IL 112116, ¶ 22; *Burns*, 2015 IL 117387, ¶¶ 22, 25, 30.

¶ 20 CONCLUSION

¶ 21 In sum, we vacate defendant's convictions for AUUW under sections 24-1.6(a)(1), (2), (a)(3)(A) as unconstitutional. We further note that the trial court also found defendant guilty of

UUWF, but did not sentence defendant under the UUWF statute because it was merged into the AUUW count pursuant to the one-act, one-crime doctrine. Accordingly, we remand this cause to the trial court for resentencing on defendant's UUWF conviction. See *People v. Dixon*, 91 Ill. 2d 346, 353-54 (1982).

¶ 22 Affirmed in part; vacated in part; remanded with instructions.