

SIXTH DIVISION  
April 18, 2014

No. 1-12-0828

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 09 CR 18128
VAIDOTAS KADISA,	)	
	)	Honorable
Defendant-Appellant.	)	Carol A. Kipperman,
	)	Judge Presiding.

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PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Lampkin and Reyes concurred in the judgment.

**ORDER**

*Held:* We reversed defendant's convictions of unlawful use or possession of a weapon by a felon and aggravated unlawful use of a weapon where the State failed to prove him guilty beyond a reasonable doubt.

¶ 1 Following a bench trial, defendant, Vaidotas Kadisa, was convicted of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)) and aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1) (West 2008)). The trial court merged the aggravated unlawful use of a weapon conviction into the unlawful use or possession of a weapon by a felon conviction and sentenced defendant to four years in prison. On appeal, defendant contends: (1) the State failed to prove him guilty beyond a reasonable doubt; and (2) his convictions for unlawful use or possession of a weapon by a felon and aggravated unlawful use of a weapon

must be vacated because the statutes creating those offenses violate the constitutional right to bear arms. We reverse.

¶ 2 At the bench trial, Officer Dean Savas of the Forest Park Police Department testified that at approximately 5:48 p.m. on June 11, 2009, he was in uniform and on patrol driving a marked police car in the area of a Mobil gas station located at 949 Harlem Avenue in Forest Park. While driving through an alley, Officer Savas saw four males "hanging around" outside a two-door, convertible BMW in the parking lot of the Mobil gas station. Knowing that the Mobil gas station was a "high drug activity area," Officer Savas "ran" the BMW's license plate and discovered that the registered owner of the vehicle had an outstanding warrant for his arrest.

¶ 3 Officer Savas testified he then went to the Mobil gas station, where he now saw two of the males inside the BMW, and two of them standing outside. Defendant was sitting in the driver's seat. The BMW was not running. Officer Savas called for backup and walked to the driver's side of the BMW. The window on the driver's side was open, and Officer Savas asked defendant if the BMW was his. Defendant replied affirmatively. Officer Savas asked defendant for identification, and defendant provided him with a State of Illinois ID card with the name "Vygintas Kadisa," which matched the name of the registered owner of the BMW with the outstanding warrant.

¶ 4 Officer Savas testified he asked defendant to step outside the BMW, which he did. Officer Savas handcuffed defendant and began walking him to the squad car. As they were walking, defendant stated that the BMW did not belong to him and that he had given Officer Savas the wrong ID. Defendant told Officer Savas that his real name was Vaidotas Kadisa. Officer Savas placed defendant in the back seat of his squad car. Officer McClintock arrived and began investigating the BMW.

¶ 5 On cross-examination, Officer Savas testified he did not know how long the BMW had been at the Mobil gas station prior to his arrival. Officer Savas could not recall whether any keys to the BMW were found on defendant. Officer Savas did not see anything "of an illegal nature" in the front seat of the car where defendant was sitting. Officer Savas testified that while walking defendant to the squad car, defendant stated that the outstanding warrant was not his, that he was not the owner of the BMW, and that the identification he had given Officer Savas belonged to his brother.

¶ 6 Officer Scott McClintock testified that in response to Officer Savas's call for backup, he drove to the Mobil gas station at around 5:48 p.m. on June 11, 2009. Upon arrival, Officer McClintock saw Officer Savas and defendant standing next to the BMW and he saw a person later identified as Ernestas Pocius sitting in the passenger side of the BMW. Officer McClintock exited his vehicle, approached the BMW, and asked Mr. Pocius to exit the car. After Mr. Pocius exited the BMW, Officer McClintock looked inside and saw a can of pepper spray, similar to the type he carries as a law enforcement officer, located behind the passenger seat on the floorboard<sup>1</sup>. Officer McClintock did not have to pull back any seats or cushions in order to see the can of pepper spray. Officer McClintock reached inside the BMW to retrieve the pepper spray, and as he did so, he smelled an odor of cannabis from inside the vehicle.

¶ 7 Officer McClintock testified he walked to the driver's side of the BMW, pushed the driver's seat forward, and saw a ski mask inside cargo netting attached to the back of the seat. He entered the rear seat of the BMW and observed what appeared to him to be marijuana crumbs located within the rear armrest area. Officer McClintock then exited the BMW, retrieved the

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<sup>1</sup> Officer McClintock also testified to discovering a second can of pepper spray "[l]ater on, after a search of the vehicle"; he did not specifically state where in the vehicle the second can of pepper spray was located.

keys from the ignition, and opened the trunk. Inside the trunk, Officer McClintock saw a bulletproof vest, a roll of duct tape, and a "club of some type."

¶ 8 Officer McClintock testified he closed the trunk, looked through the back window, and saw a "plastic vent" running the width of the back seat, "about 16, 18 inches wide." Officer McClintock peered down into the plastic vent, inside of which he was able to see "in between the back seat and the panel that's in the trunk" (hereinafter, the compartment). Officer McClintock saw "something shiny on the inside through there," so he went back inside the BMW, peered over the back seat headrest on the driver's side of the vehicle, and looked down into the compartment. There he saw the butt of a gun and another ski mask. Officer McClintock pulled that back seat forward, after which he was able to reach in and search the compartment, which was about 20 inches wide and 8 inches deep. Officer McClintock discovered "a total of three guns, numerous pairs of gloves, a bag of badges, handcuffs, flashlights." One of the handguns was a black Ruger handgun that was loaded with a full chamber, including a bullet in the chamber. Another one of the handguns was a Beretta handgun that was loaded. The third gun was a BB gun. Officer Savas testified he did not know whether any type of DNA or fingerprint testing was done on the guns and other items recovered from the BMW by Officer McClintock.

¶ 9 Officer McClintock acknowledged that to see into the compartment where the guns, gloves, badges, handcuffs, and flashlights were located, one would have to be in the back seat of the vehicle, looking over the headrest, or looking down inside through the back window. Officer McClintock testified he did not know whether the inside of the compartment could be seen by a person who turned toward the back while sitting in the driver's seat. Officer McClintock further testified:

"Q. Well, when you entered the car, is it fair to say that when you first entered the car, you could not, even looking over the seat, see what was in that [compartment] area, is that correct?

A. From the driver's seat?

Q. From the driver's seat.

A. No.

Q. When you're going into the front of the car?

A. No.

Q. You couldn't see what was behind the seats, is that correct?

A. No."

¶ 10 Officer McClintock testified there was no contraband on the front floor of the BMW, he never saw defendant drive the BMW, and he did not know how long the BMW had been parked at the gas station.

¶ 11 Following Officer McClintock's testimony, the trial court admitted a certified copy of defendant's prior felony conviction for possession of a stolen motor vehicle and the State rested its case. Defendant did not testify or present any evidence on his behalf.

¶ 12 The trial court convicted defendant of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)) and aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1) (West 2008)). The trial court merged the aggravated unlawful use of a weapon conviction into the unlawful use or possession of a weapon by a felon conviction and sentenced defendant to four years' imprisonment. Defendant appeals.

¶ 13 Defendant contends the State failed to prove him guilty of unlawful use or possession of a weapon by a felon and aggravated unlawful use of a weapon beyond a reasonable doubt. The

relevant standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in the original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¶ 14 To convict defendant of unlawful use or possession of a weapon by a felon and aggravated unlawful use of a weapon, the State had to prove in relevant part that defendant *knowingly* possessed the firearms found in the compartment in the back of the BMW. See 720 ILCS 5/24-1.1(a) (West 2008); 720 ILCS 5/24-1.6(a)(1) (West 2008). "Knowing possession" may be either actual or constructive. *People v. Bailey*, 333 Ill. App. 3d 888, 891 (2002). Here, the parties agree that this was a constructive possession case. "Constructive possession is established where (1) the defendant had knowledge of the presence of the weapon; and (2) the defendant exercised immediate and exclusive control over the area where the weapon was found." *Id.*

¶ 15 Defendant argues that his constructive possession of the firearms was not proven here because the State failed to show he had knowledge of the presence of the firearms in the compartment in the back of the BMW. Initially, we note that defendant's mere presence in the BMW is not enough for an inference to arise that defendant knew of the firearms in the compartment; for the inference to arise, the State had to demonstrate defendant had "regular, ongoing control over the vehicle." *People v. Hampton*, 358 Ill. App. 3d 1029, 1032 (2005). "Regular and ongoing control over a vehicle might be established through proof that the defendant owns or regularly drives the vehicle." *Id.* No such evidence was presented here, where the BMW was owned by defendant's brother, *not* by defendant, and where no testimony was offered as to anyone actually seeing defendant driving the vehicle. Specifically, Officer

Savas testified he first saw four males outside the BMW in the Mobil gas station and later he saw defendant sitting in the driver's seat of the BMW, which was not running. Officer McClintock testified that when he arrived at the Mobil gas station, defendant was already outside the BMW, and Officer McClintock never saw defendant driving the vehicle.

¶ 16 Because the State may not rely on an inference of knowledge stemming from defendant's mere presence in the driver's seat of the BMW, we proceed to determine whether the State presented other evidence of knowledge. *Bailey* is instructive. In *Bailey*, the defendant there, Cleavon Bailey, was riding in the front passenger seat of a car driven by Gary McDonald on November 4, 2000. *Id.* at 889. At 6:15 a.m., Joliet police officers Tim Powers and Darren Prochaska stopped the vehicle after observing it enter and leave the Joliet police station parking lot several times. *Id.* Officer Powers saw an open bottle of beer on the floor of the car and asked Mr. McDonald and Mr. Bailey to exit the car. *Id.* at 889-90. While conducting an inventory search of the car, Officer Powers found an uncased, loaded 9-millimeter Ruger under the front passenger seat. *Id.* at 890. Officer Powers testified he believed the gun was within Mr. Bailey's arm reach but that it was not visible until he looked under the seat. *Id.* Mr. McDonald and Mr. Bailey were taken into custody. *Id.* While in custody, Mr. Bailey stated he did not know the gun was in the car. *Id.*

¶ 17 Detective Dennis McWherter conducted an interview of Mr. Bailey at the police station which was observed by Detective Frank Miller. *Id.* According to Detectives McWherter and Miller, Mr. Bailey said that Mr. McDonald showed him a gun while they were outside Mr. Bailey's house and that after looking at the gun, Mr. Bailey placed it on the kitchen table. *Id.* When questioned further, Mr. Bailey stated that Mr. McDonald showed him a gun inside the car

and that Mr. Bailey then gave it back to Mr. McDonald and left the vehicle. *Id.* At trial, Mr. Bailey testified he had no knowledge of the gun being in the car. *Id.*

¶ 18 The jury convicted Mr. Bailey of aggravated unlawful use of a weapon. *Id.* On appeal, Mr. Bailey argued, as here, that his conviction should be reversed because the State failed to prove he had knowledge of the weapon in the car and, thus, failed to prove his constructive possession of the weapon. *Id.* at 891. The appellate court noted that "[a] defendant's mere presence in a car, without more, is not evidence that he knows a weapon is in the car." *Id.* The appellate court held that "[f]actors from which knowledge could be inferred include: (1) the visibility of the weapon from defendant's position in the car; (2) the period of time in which the defendant had an opportunity to observe the weapon; (3) any gestures by the defendant indicating an effort to retrieve or hide the weapon; and (4) the size of the weapon." *Id.* at 891-92. The appellate court also held that courts should consider "any other relevant circumstantial evidence of knowledge, including whether the defendant had a possessory or ownership interest in the weapon or in the automobile in which the weapon was found." *Id.* at 892.

¶ 19 After reviewing the record, the appellate court determined that the State failed to provide any evidence that Mr. Bailey had knowledge of the presence of the weapon under his seat. *Id.* Specifically, the appellate court noted: (1) the weapon was located underneath the passenger seat of the car and was not visible to defendant; (2) no fingerprints were taken from the gun, the gun had not been reported stolen or transferred, and the car in which the gun was found was not stolen; and (3) the officers did not testify to seeing Mr. Bailey make any gestures indicating he was trying to retrieve or hide the weapon. *Id.* The appellate court further noted that "[a]lthough [Mr.] Bailey's credibility was called into question because he allegedly told [Detective] McWherter two different accounts of [Mr.] McDonald showing him a gun, a lack of credibility is



not enough to establish that [Mr.] Bailey had knowledge of the presence of the weapon in the vehicle." *Id.* Accordingly, the appellate court reversed Mr. Bailey's conviction. *Id.*

¶ 20 In the present case, as in *Bailey*, an examination of the relevant factors shows that the State failed to prove beyond a reasonable doubt that defendant had knowledge of the presence of the weapons inside the compartment in the back of the BMW. As to the first factor to be considered, the visibility of the weapons from defendant's position in the driver's seat of the car, Officer McClintock testified in pertinent part that when he entered the front of the BMW to conduct his investigation, he was unable to see the compartment in back which contained the weapons. Officer McClintock further testified:

Q. So in order to see into that [compartment in which the weapons were iscovered], you had to get into the back seat, peer over the back seat, and look into the compartment], is that correct?

A. That, or while standing on the outside of the vehicle, you could peer in through the back window and look down inside, also.

Q. And from the driver's seat, you could not, turning around in the driver's seat, look back and see this [compartment], could you?

A. I wouldn't know. That I wouldn't know."

¶ 21 Officer McClintock elsewhere clarified in his testimony that when looking into the back window, he could see something "shiny" in the compartment, but that he had to enter the vehicle and peer over the back seat headrest on the driver's side of the vehicle in order to identify the shiny object as the butt of a gun. Officer McClintock had to pull the back seat forward to see the other two guns.

¶ 22 Officer McClintock's testimony failed to establish that the weapons inside the compartment could be seen by defendant while sitting in the driver's seat or even that they could be seen and identified as such while he was standing outside the vehicle prior to entering the driver's seat. There was no other testimony regarding the visibility of the weapons.

¶ 23 As to the second factor, the period of time in which defendant had an opportunity to observe the weapons inside the compartment in the back of the BMW, there was no testimony regarding the exact amount of time defendant was in and around the BMW during which he could have observed the weapons. We only know from Officer Savas's testimony that at approximately 5:48 p.m. on June 11, 2009, he drove down an alley near a Mobil gas station and viewed four males "hanging around" outside the BMW parked at the Mobil. Officer Savas immediately ran a check of the license plate, discovered an outstanding arrest warrant for the owner of the vehicle, and then immediately went to the Mobil where he now saw defendant sitting in the driver's seat. Officer Savas also called for backup; in response, Officer McClintock arrived at the Mobil gas station right around 5:48 p.m., at which point defendant had already exited the vehicle at Officer Savas's request. Officer Savas's and Officer McClintock's testimony indicates to us that at most, only a matter of minutes passed from the time Officer Savas first saw defendant outside the BMW at the Mobil gas station, to when he ran the license plate, returned to the Mobil, saw defendant in the driver's seat, and questioned and arrested him. Thus, from the time Officer Savas first observed defendant to when he arrested him, defendant only had minutes to observe the weapons in the compartment in the back of the BMW. We further note that Officer Savas and Officer McClintock testified they did not know how long the BMW had been parked at the Mobil gas station prior to their arrival, *i.e.*, there was no testimony regarding any

specific period of time prior to their arrival during which defendant could have been in or near the BMW parked at the Mobil and observed the weapons inside the compartment.

¶ 24 As to the third factor, any gestures by defendant indicating an effort to retrieve or hide the weapons, no such evidence was presented by the State.

¶ 25 As to the fourth factor, the size of the weapons, they were two handguns and a BB gun small enough to fit down a 16-to-18 inch vent and an 8-inch deep, 20-inch wide compartment between the back seat and trunk. They were small enough, and configured in the compartment in such a way, as not to be identifiable as weapons by someone outside the car viewing the compartment through the back window; one of the objects therein could only be identified as a gun when viewed inside the car, while looking over the back seat headrest. The two other guns in the compartment could not even be seen at all until the back seat was pulled forward.

¶ 26 As to any other relevant circumstantial evidence of knowledge, including whether defendant had a possessory or ownership interest in the weapons or in the BMW in which the weapons were found, we note that, as in *Bailey*, there was no evidence that fingerprints were taken from the guns and no evidence defendant had a possessory or ownership interest in them. The evidence at trial indicated that the BMW belonged to defendant's brother, *not* to defendant.

¶ 27 We recognize that we must view the evidence in the light most favorable to the prosecution when considering a challenge to the sufficiency of the evidence. *Jackson*, 443 U.S. at 319. However, as in *Bailey*, even under this standard of review we find no evidence on the facts of this case from which the trier of fact could infer defendant's knowledge of the presence of the weapons inside the compartment in the back of the BMW. Thus, the State failed to prove defendant's constructive possession of the weapons beyond a reasonable doubt.

¶ 28 The State argues, though, that the trier of fact could infer from the other items found in the BMW, including the black ski mask in the netting behind the driver's seat, the pepper spray located behind the passenger seat on the floorboard, and the bulletproof vest, duct tape and club located in the trunk that defendant had knowledge of the weapons. We disagree. Initially, we note that although the ski mask and pepper spray were visible inside the car, the bulletproof vest, duct tape and club (collectively referred to as, the items) were only visible if the trunk was opened, and no evidence was presented that defendant ever opened the trunk. Further, even viewing the evidence in the light most favorable to the prosecution and assuming defendant knew that the items were all in the car, the State fails to show how defendant's knowledge thereof equates with knowledge of the presence of the weapons, especially where the weapons were located inside the compartment *away* from all those items and where there was no evidence of any of the factors listed in *Bailey* that would otherwise indicate defendant's knowledge of the weapons.

¶ 29 The State also argues that defendant's knowledge of the presence of the weapons in the compartment in the back of the BMW can be inferred by the circumstances surrounding his initial encounter with Officer Savas. During that initial encounter, defendant first stated the BMW was his and he provided the officer with the State of Illinois ID card with the name of his brother, the owner of the BMW, and then, when he was told he was being arrested on his brother's outstanding warrant, he told the officer that the BMW did not belong to him and that he had given the wrong ID. Even viewing this evidence in the light most favorable to the prosecution, we fail to see how defendant's initial false statement of ownership of the BMW and provision of his brother's ID and, then, his subsequent correction equates with knowledge of the presence of weapons inside. This is especially so where: defendant was seen seated in the

driver's seat of the BMW for only a short time while it was parked at the Mobil gas station and there was no evidence he had any regular, ongoing control over the vehicle; the weapons were out of defendant's view in the compartment in the back of the vehicle; and there was absolutely no evidence of any of the *Bailey* factors, such as defendant's *actual* possessory or ownership interest in the BMW, which would indicate defendant's knowledge of the presence of the weapons inside.

¶ 30 We note that the trial court found that defendant exhibited a "consciousness of guilt" regarding the presence of the weapons in the vehicle by initially misidentifying himself as the owner of the BMW and then correcting himself. We disagree. While no explanation was ever given at trial for why defendant initially falsely identified himself as the owner of the BMW, it is improbable to think he would have done so knowing there were weapons in the vehicle that would have potentially subjected him, as the stated owner of the vehicle, to arrest for possession thereof. See *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001) (a conviction will be reversed where the evidence is so improbable, unconvincing or contrary to human experience as to justify a reasonable doubt of defendant's guilt). We also note that the evidence at trial indicates that defendant told the officer of his correct identity only after learning that there was a warrant out for his brother's arrest, *i.e.*, this conversation with the officer was motivated to prevent his being arrested under his brother's warrant and did not indicate his knowledge of the weapons in the compartment in the back of the BMW.

¶ 31 The State also argues that this case is like *People v. Ross*, 407 Ill. App. 3d 931 (2011), in which the appellate court held that the trier of fact could infer that the defendant there, Jermaine Ross, knew about the gun located in the car in which he was sitting. *Id.* at 937. *Ross* is inapposite, as Mr. Ross's knowledge was inferred based on: (1) his control and possession of the

vehicle that he was permitted to use by the owner; (2) his flight from the vehicle as the police officers approached; and (3) one officer's observation of the butt of the gun in clear view on the floor of the backseat of the vehicle. *Id.* at 936, 937. None of those factors are present here, where: Officer Savas's testimony indicated he saw defendant sitting in the driver's seat of the BMW parked at the Mobil gas station for only a matter of minutes before approaching him, and there was no evidence defendant had any regular, ongoing control over the vehicle; Officer McClintock's testimony indicated that the guns were not in plain view but rather were in the compartment in the back of the car out of the view of the driver; and defendant did not attempt to flee.

¶ 32 For the foregoing reasons, we reverse defendant's convictions. As a result of our disposition of this case, we need not discuss the other arguments on appeal.

¶ 33 Reversed.