2017 IL App (1st) 143145-U

FIRST DIVISION
July 24, 2017

No. 1-14-3145

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 13212
	)	
MARQUISE SMITH,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 *Held*: Reversed and remanded where the trial court committed plain error by admitting into evidence an affidavit stating that defendant did not have a Firearm Owners Identification card.

¶ 2 The trial court found defendant Marquise Smith guilty of aggravated unlawful use of a weapon (AUUW). 720 ILCS 5/24-1.6(a)(1), (3)(C) (West 2012). On appeal, Mr. Smith argues that the trial court committed plain error when it admitted an affidavit into evidence to prove he

did not have a Firearm Owners Identification (FOID) card and also challenges various fines and fees imposed in his case. We reverse and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 Mr. Smith was charged with aggravated unlawful possession of a firearm without a FOID card (720 ILCS 5/24-1.6(a)(1), (3)(C) (West 2012)). At Mr. Smith's combined motion to suppress hearing and bench trial, Officer Todd Mueller of the Chicago police department testified that, at approximately 10 p.m. on July 16, 2014, he was patrolling the area of 76th Street and Cottage Grove Avenue in an unmarked vehicle. The area was known for "high gang crime activity" and Officer Mueller had often recovered illegal weapons there in the past. Officer Mueller saw a man, later identified as Mr. Smith, walking quickly and looking around in several directions. Officer Mueller drove around the block twice to observe Mr. Smith, who was still acting the same way.

¶ 5 Mr. Smith was walking briskly, east bound and west bound, looking around "in all directions." Officer Mueller pulled up next to Mr. Smith and stopped. As Mr. Smith approached Officer Mueller's vehicle, Officer Mueller noticed a "medium-sized bulge as if the object was weighted in [Mr. Smith's] front right pants pocket," the same pocket in which Mr. Smith had his hand. From experience, Officer Mueller believed Mr. Smith could have a weapon in his pocket. Officer Mueller ordered Mr. Smith to put his hands in the air, which Mr. Smith did.

¶ 6 Officer Mueller detained Mr. Smith and patted him down. Officer Mueller felt a weapon in Mr. Smith's pocket and recovered a .380 semiautomatic handgun. The gun was loaded with six live rounds, one of which was chambered. Officer Mueller arrested Mr. Smith and took him to the police station, where Officer Mueller inventoried the handgun.

¶ 7 The trial court granted the State's request, without objection, to admit into evidence a

notarized "certification" letter from the Illinois State Police, dated August 6, 2014, which stated:

> "Based on the following name and date of birth information provided by the Cook County State's Attorney's Office, I, Administrative Assistant Debbie Claypool, Firearms Service Bureau (FSB), Illinois State Police, do hereby certify, after a careful search of the FSB files, the information below to be true and accurate for [Mr.] Smith whose date of birth is February 24, 1995, [that he] has never been issued a FOID or [Concealed Carry License] Card as of August 6, 2014."

¶ 8 Following closing arguments, the trial court found Mr. Smith guilty of AUUW and sentenced him to one year in prison and $824 in fines and fees.

¶ 9 JURISDICTION

¶ 10 Mr. Smith was sentenced on September 5, 2014, and he timely filed notice of appeal that same day. This court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)).

¶ 11 ANALYSIS

¶ 12 Mr. Smith's primary claim on appeal is that the trial court violated his right to confrontation under the United States and Illinois constitutions when it admitted Ms. Claypool's certification letter into evidence at trial. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. Mr. Smith, citing our opinion in *People v. Diggins*, 2016 IL App (1st) 142088, argues that the letter was inadmissible as it was an affidavit by Ms. Claypool and was testimonial hearsay, admitted for its truth, and Ms. Claypool was not subject to prior cross-examination regarding its contents and was not shown to be unavailable to testify at trial.

¶ 13 Mr. Smith acknowledges that he did not make a right-to-confrontation objection at trial or in a posttrial motion and, therefore, his claim has been forfeited on appeal. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Mr. Smith maintains, however, that the admission of Ms. Claypool's certification letter as evidence may be reviewed for plain error.

¶ 14 Under the plain error doctrine, a reviewing court may address a forfeited claim in two circumstances: "(1) where a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error and (2) where a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Belknap*, 2014 IL 117094, ¶ 48. In applying the plain error doctrine, it is appropriate to first determine whether error occurred at all. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). We find that error did occur because the admission of the certification letter, when Mr. Smith did not have the opportunity to cross-examine Ms. Claypool, violated Mr. Smith's sixth amendment right to confrontation.

¶ 15 We agree with Mr. Smith that our decision in *Diggins*, 2016 IL App (1st) 142088, controls this case. In *Diggins*, the State charged the defendant with AUUW, alleging that he possessed a firearm without a FOID card. *Id.* ¶ 3. At trial, the court allowed into evidence a notarized "certified letter" from a sergeant with the Firearm Services Bureau of the Illinois State Police stating that he had searched the FOID files and determined the defendant had no FOID card. *Id.* ¶¶ 6-7. The trial court found the defendant guilty. *Id.* ¶ 9. On appeal, the defendant made the same argument that Mr. Smith makes here: that the trial court violated his constitutional right to confrontation by admitting the certified letter—an affidavit that was testimonial hearsay. *Id.* ¶ 11.

¶ 16 We agreed, noting that " '[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.' " *Diggins*, 2016 IL App (1st) 142088, ¶ 13 (quoting *Crawford v. Washington*, 541 U.S. 36, 59 (2004)). We held:

> "[T]he certified letter was an affidavit, as it was a declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths. [Citation.] Moreover, the affidavit was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *** [Citation.]. *** Additionally, whether defendant owned a FOID card constituted an element of AUUW, which the State had the burden to prove. Accordingly, absent a showing that the witness was unavailable to testify at trial and that defendant had a prior opportunity to cross-examine him, defendant was entitled to be confronted with the witness at trial." (Internal quotation marks omitted.) *Id.* ¶ 16.

As the *Diggins* defendant had no opportunity to cross-examine the sergeant and the State did not prove the sergeant was unavailable, we found that the trial court erred when it admitted the affidavit into evidence. *Id.* Finding the error was not harmless, we reversed and remanded for a new trial. *Id*. ¶ 21.

¶ 17 Ms. Claypool's notarized "certification" letter in this case was also prepared after Mr. Smith's arrest. There is no question that Ms. Claypool, like the sergeant in *Diggins*, prepared the document for use at trial to establish an element of the charged offense. Furthermore, Mr. Smith had no opportunity to cross-examine Ms. Claypool and the State did not contend that she was unavailable. Accordingly, following *Diggins*, we find that the trial court violated Mr. Smith's

right to confront the witness against him when it admitted Ms. Claypool's affidavit into evidence to prove that Mr. Smith did not have a FOID card.

¶ 18 The violation of Mr. Smith's right to confrontation was a clear error. Therefore, we next consider whether either prong of the plain error doctrine has been satisfied. See *Sargent*, 239 Ill. 2d at 189-90. Under the first prong, we must determine whether "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant." *Id.* at 189. The State presented no evidence, other than Ms. Claypool's hearsay affidavit to prove that Mr. Smith had no FOID card. This was an essential element of AUUW. See *Diggins*, 2016 IL App (1st) 142088, ¶ 18. The improper admission of Ms. Claypool's affidavit into evidence was therefore plain error as, without it, the State could not have proved this element of the offense.

¶ 19 Where, as here, "the evidence presented at the first trial, including the improperly admitted evidence, would have been sufficient for any rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt," double jeopardy does not apply and "retrial is the proper remedy." *People v. McKown*, 236 Ill. 2d 278, 311 (2010). Accordingly, we reverse the trial court's judgment and remand for a new trial.

¶ 20 CONCLUSION

¶ 21 Our decision to reverse Mr. Smith's conviction makes it unnecessary to reach the issues he raises as to fines and fees. For the reasons stated, we reverse the trial court's judgment and remand for a new trial.

¶ 22 Reversed.