2011 IL App (3d) 090865-U

Order filed September 1, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3–09–0865
v.	)	Circuit No. 08–CF–1531
	)	
JOSH McCALL,	)	Honorable James E. Shadid,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Schmidt and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's presence in the backseat of a vehicle with two individuals carrying shotguns was enough evidence for a jury to find, beyond a reasonable doubt, that defendant constructively possessed a firearm. The trial court's assessment of fees was improper.

¶ 2 Following a jury trial, defendant, Josh McCall, was convicted of attempted residential burglary (720 ILCS 5/8–4(a), 19–3(a) (West 2008)) and unlawful possession of a weapon by a felon (720 ILCS 5/24–1.1(a) (West 2008)). Defendant appeals, arguing that the State failed to

prove him guilty beyond a reasonable doubt of unlawful possession of a weapon and that the trial court improperly assessed certain fees. We modify the fees assessed by the trial court and otherwise affirm.

¶ 3 FACTS

¶ 4 On December 14, 2008, defendant was arrested after police responded to a 911 call reporting an attempted burglary. Defendant was charged with residential burglary (720 ILCS 5/19–3(a) (West 2008)), attempted residential burglary (720 ILCS 5/8–4(a), 19–3(a) (West 2008)), unlawful 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)). A jury trial followed.

¶ 5 At trial, the State called Henry Burch, the owner of the home that defendant was charged with attempting to burglarize. Burch testified that he was at home on the night of December 14, 2008, and heard noises outside of his house. When the noises reached the front door, Burch went to a window and witnessed two individuals, later identified as Tremiere Hollie and Derell Curtis, with masks on standing on his porch. A third individual, later identified as defendant, was standing on a landing in front of the porch. Defendant gave instructions to the other two men, and they proceeded to the side and back of the house. Burch further testified that he knew defendant because defendant had dated his girlfriend's sister. He believed it was possible that defendant could have received a key to the house from his girlfriend's sister.

¶ 6 Candie Rowe and Miriah Stone testified that they were in a car with defendant on December 14, 2008. Both witnessed defendant in the backseat of the car sitting next to Hollie and Curtis. Pursuant to directions given by defendant, Rowe drove the vehicle to an alley near

Burch's residence. When the three men got out, Hollie and Curtis were carrying big guns. Neither Rowe nor Stone ever saw defendant with a gun.

¶ 7 Officer Roger Martin testified that he arrested defendant on December 14, 2008. At the time of the arrest, defendant was wearing a pair of brown jersey gloves. Following defendant's arrest, two shotguns were found outside of Burch's residence on a landing. The guns were later processed; however, no fingerprints were found. Officer Craig Hightower testified that it was not uncommon to fail to find fingerprints on a weapon and that an individual wearing gloves would not leave fingerprints.

¶ 8 Following the close of the evidence, the jury convicted defendant on the charges of attempted residential burglary and unlawful possession of a weapon by a felon. The trial court sentenced defendant to 14 years imprisonment on both offenses, with the sentences to run concurrently. It also imposed a $200 deoxyribonucleic acid (DNA) analysis fee, $25 court services or court protection fee, $25 crime stoppers fee, $20 violent crime victims assistance fund fee, and a $10 drug court or mental health court fee. Defendant appeals.

¶ 9 ANALYSIS

¶ 10 On appeal, defendant's first argument is that the State failed to prove him guilty beyond a reasonable doubt of unlawful possession of a weapon by a felon. When presented with a challenge to the sufficiency of the evidence, the relevant question 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. *People v. Collins*, 106 Ill. 2d 237 (1985).

¶ 11 In order to sustain a conviction of unlawful possession of a weapon by a felon, the State must prove that defendant: (1) knowingly possessed a firearm; and (2) had been convicted of a felony. *People v. Ingram*, 389 Ill. App. 3d 897 (2009). Knowing possession may be either actual or constructive. Constructive possession is established where the defendant: (1) had knowledge of the presence of the weapon; and (2) exercised immediate and exclusive control over the area where the weapon was found. *People v. Bailey*, 333 Ill. App. 3d 888 (2002).

¶ 12 Knowledge may be proved by circumstantial evidence, including the visibility of the weapon from defendant's position and the size of the weapon. *Id.* The rule that possession must be exclusive does not mean that possession may not be joint. *People v. Burke*, 136 Ill. App. 3d 593 (1985). Where defendant does not have personal physical possession, he can still be said to have constructive possession if he knows of the presence of the weapon and has the intent and capability to maintain control and possession. *People v. Zambetta*, 132 Ill. App. 3d 740 (1985). Where two or more persons share the intention and power to exercise control over a thing, each person has possession. *People v. Walker*, 335 Ill. App. 3d 102 (2002).

¶ 13 Defendant contends that the State did not produce evidence sufficient to prove him guilty beyond a reasonable doubt of unlawful possession of a weapon by a felon. Because defendant was not found in actual possession of a firearm, the question is whether he exercised constructive possession. First, we note that the facts were sufficient to prove that defendant had knowledge of the presence of a weapon. The facts clearly establish that defendant was present in the backseat of a car with two other individuals, who each held large firearms. Further, the evidence establishes that defendant and the two other individuals were engaged in an attempted burglary

and that the weapons were brought along for that purpose. This evidence was enough for a jury to determine that defendant had knowledge of the weapons.

¶ 14 A more difficult question is whether defendant had immediate and exclusive control over the area where the weapons were found. In *People v. Williams*, 98 Ill. App. 3d 844 (1981), the court affirmed defendant's conviction for unlawful use of a deadly weapon, rejecting his argument that because several people handled the weapon, he did not have exclusive control and thus did not possess the weapon. The court stated:

> "The law is clear that the exclusive dominion and control required to establish constructive possession is not diminished by evidence of others' access to the contraband. [Citation.] When the relationship of others to the contraband is sufficiently close to constitute possession, the result is not vindication of the defendant, but rather a situation of joint possession. To hold otherwise would enable persons to escape criminal liability for possession of contraband by the simple expediency of inviting others to participate in the criminal enterprise." *Id* at 849.

¶ 15 In *People v. Alston*, 302 Ill. App. 3d 207 (1999), the court found constructive possession where a firearm was found in the backseat of a vehicle in which defendant was a backseat passenger. At the time the gun was found, defendant was neither in possession of the weapon nor in the car; however, the court concluded that evidence of defendant's proximity to the weapon while in the vehicle was sufficient to allow a jury to conclude that defendant constructively possessed the firearm.

¶ 16 Here, evidence of defendant's proximity to the firearm while in the car and his intent to participate in a burglary could lead a jury to properly conclude that defendant constructively

possessed a firearm. Two witnesses, Rowe and Stone, testified that they were in the front seat of a car in which defendant, Hollie, and Curtis were backseat passengers. Their testimony established that defendant gave directions to a house and that the three men exited the car with two big guns. Further, Burch witnessed defendant give directions to Hollie and Curtis.

¶ 17 This evidence was sufficient to establish constructive possession, in that defendant shared the intent and power to exercise control over the firearms. Defendant's close proximity to the weapons while in the car is evidence of his ability to possess the weapons. The evidence that defendant gave directions to the house and further directed his companions could establish that defendant had the intent and the power to exercise control over the firearms if he so desired. Therefore, we find that the evidence presented at trial was sufficient to prove defendant constructively possessed a firearm and thus was guilty of unlawful possession of a weapon by a felon.

¶ 18 Defendant next contends that the trial court improperly imposed certain fines and fees against him. Initially, we note that the record on appeal does not include any documentation relating to the imposition of fines or fees, or any evidence relating to defendant's current status in the DNA database. However, defendant's appendix to his supplemental brief included a computer printout of fines and fees from the clerk of the circuit court of Peoria County and an Illinois State Police document showing that a DNA sample was received and analyzed pursuant to a prior conviction. We take judicial notice of these documents and accept them for what they appear to be. See *People v. Grayer*, 403 Ill. App. 3d 797 (2010), *rev'd on other grounds*, 242 Ill. 2d 285 (2011). Therefore, the State's motion to strike defendant's supplemental brief is denied.

¶ 19 Following defendant's conviction, a $200 DNA analysis fee, $25 court services or court protection fee, $25 crime stoppers fee, $20 violent crime victims assistance fund fee, and a $10 drug court or mental health court fee were assessed against defendant. Defendant argues that all of these fines or fees were improper except for the $10 drug court or mental health fee. Initially, we note that the State concedes that the court services or court protection and crime stoppers fees were improperly assessed. We agree with the concession. See *People v. Beler*, 327 Ill. App. 3d 829 (2002); 55 ILCS 5/5–1103 (West 2008). Therefore, we vacate those fees.

¶ 20 With regards to the DNA analysis fee, the supreme court recently held that a trial court can only order the taking, analysis, and indexing of a qualified offender's DNA, and the payment of the analysis fee, where the defendant is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011). Defendant has produced a copy of an Illinois State Police document showing that a DNA sample was received from defendant and analyzed pursuant to a prior conviction. Therefore, we also vacate the imposition of the DNA analysis fee.

¶ 21 Because we find that the court services or court protection, crime stoppers, and DNA analysis fees were improper, we note that the violent crime victims assistance fund fee should be reduced. Pursuant to section 10(b) of the Violent Crime Victims Assistance Act (725 ILCS 240/10(b) (West 2008)), an additional penalty of $4 will be assessed for every $40, or fraction thereof, of fines imposed. Here, the only fine properly imposed was the $10 drug court or mental health court fee. Therefore, the violent crime victims assistance fund fee should be reduced to $4.

¶ 22 CONCLUSION

¶ 23 We modify the fees by: (1) vacating the court services or court protection fee, crime stoppers fee, and DNA analysis fee; and (2) reducing the violent crime victims assistance fund fee to $4. The judgment is otherwise affirmed.

¶ 24 Affirmed as modified.