

FIFTH DIVISION
Rule 23 Order filed December 21, 2012
Modified upon denial of rehearing June 21, 2013

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. 10 CR 11890
)	
HALDERON MURPHY,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Epstein concurred in the judgment.

ORDER

HELD: Trial counsel was ineffective for failing to file a motion to quash arrest and suppress evidence; evidence was sufficient to support defendant's conviction for armed habitual criminal.

¶ 1 Following a bench trial, defendant Halderon Murphy was convicted under the armed

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habitual criminal statute and was sentenced to a prison term of six years and six months. On appeal, defendant contends that he was not proven guilty of being an armed habitual criminal beyond a reasonable doubt, that his trial counsel was ineffective for failing to file a pretrial motion to suppress evidence, and that the armed habitual criminal statute violates the *ex post facto* clauses of the United States and Illinois Constitutions. For the following reasons, we remand for further proceedings.

¶ 2 BACKGROUND

¶ 3 The evidence presented at trial established that defendant was present in a third-floor apartment at 6735 South Clyde in Chicago on June 12, 2010, at approximately 2:50 p.m. Sergeant Ray McInnery testified that the police arrived to execute an arrest warrant for Terrell Reed, who was involved in several shootings. When the police arrived, they knocked on the door, announced their office and asked if they could enter. The police heard noises on the other side of the door for approximately one minute before Laketa Chambers answered the door.

¶ 4 The police informed Chambers that they were looking for Reed and asked if they could look around the apartment. Chambers gave them permission to enter the apartment to look for Reed. McInnery saw defendant in the bathroom, brushing his teeth. Defendant appeared nervous and fidgety. McInnery asked Chambers if there were any weapons in the apartment and defendant volunteered "she's got a gun in her purse." McInnery asked who had a gun in their purse, and defendant replied that Chambers' mom had a gun in her purse in her bedroom closet. Officer Tim Hayes, who was in the bedroom where defendant said the gun was located, recovered the gun and a box of ammunition from the closet. The gun was a .38 special revolver

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containing six live rounds. After disabling the gun, Hayes brought it out to show McInnery. According to McInnery, defendant appeared nervous and reiterated that the gun belonged to Chambers' mother when he was asked about it.

¶ 5 McInnery then spoke to Chambers' mother, Darlene Chambers-Carpenter, on the phone. Chambers-Carpenter rented the apartment and lived in the room where the gun and ammunition was discovered. She told him that there should be no weapon in the residence. After the phone conversation, defendant again appeared nervous and was overheard by the officers telling Chambers that he was a convicted felon and could not go back to jail. Defendant had a bag of clothing at the apartment, which was not inventoried. McInnery stated that defendant was arrested and subsequently taken to the police station for processing and further investigation.

¶ 6 Hayes testified that upon arriving at the station, he inventoried the gun and ammunition before arresting defendant and giving him *Miranda* warnings. Defendant then agreed to speak with Hayes and said, "Listen, man. The gun is mine. I had it for protection. The dude you're looking for just shot up the neighborhood." Hayes testified that this statement was not memorialized because there were no equipment devices in the basement for the gun team.

¶ 7 The State then introduced two certified copies of conviction for defendant. The first was a Class 2 possession of a controlled substance with intent to deliver committed in 2006, and aggravated unlawful use of a weapon committed in 2002. The State then rested its case-in-chief. Defendant's motion for a directed finding was then denied.

¶ 8 Laketa Chambers testified that she lived at 6735 South Clyde in the third-floor apartment with her mother and two children. She was friends with defendant, who was there at the

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apartment with her on June 12, 2010, when the police arrived. The officers indicated that they had a search warrant, so she opened the door and they entered with their guns drawn at her and her children. The officers never asked for permission to enter the apartment and made everyone sit on the floor. After searching the apartment, the police found a gun in her mother's room.

According to Chambers, defendant never spoke to the officers before or after the gun was found, and he did not live at the apartment. She knew that the officers subsequently called her mother.

¶ 9 Darlene Chambers-Carpenter testified that the gun recovered by police was actually hers. She testified that her husband found the gun and ammunition under an appliance they were replacing in the kitchen. Chambers-Carpenter stated that she took the gun and put it in her purse on a shelf in her bedroom closet and planned to inform police. Before she could contact police however, she had to leave town for a family emergency. She recalled speaking to police while she was out of town on June 12, 2010, and said that she had forgotten about the gun when she told police that there were no weapons in the apartment. Chambers-Carpenter had no relation to defendant except knowing him as one of her daughter's friends.

¶ 10 Defendant testified on his own behalf that he lived in Glenwood, Illinois and not at 6735 South Clyde. According to defendant, he was just visiting Chambers at her apartment and did not keep personal items there. Defendant stated that he never told the police about a gun in the apartment and denied telling the police that the gun was his at the police station. He also stated that no one ever asked him where he lived or worked during processing at the police station. However, there was a stipulation in the State's rebuttal that Officer Hayes did question defendant about his residence and employment during processing at the station.

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¶ 11 The trial court found that both defendant and Chambers-Carpenter lacked credibility, and that the police officers who testified were credible. The court noted that while the State has the burden of proof, if the defense puts on evidence or the defendant decides to testify on his own behalf, then all of the evidence presented must be weighed. Defendant was ultimately found guilty of being an armed habitual criminal and unlawful use of a weapon by a felon.

¶ 12 Defense counsel filed a motion for new trial, arguing that Chambers-Carpenter's testimony regarding the gun could not be disregarded because it was uncontradicted. Defense counsel also indicated that he would have filed a motion to quash the arrest based on the contradiction in the officers' testimony as to when defendant was actually arrested but was unaware of the contradictory statements until their testimony at trial. Defendant's motion for new trial was denied and the trial court noted that a "motion to suppress is never dilatory," and could have been made at any time before trial or during trial. Defendant was subsequently sentenced to a prison term of six years and six months. This timely appeal followed.

¶ 13 ANALYSIS

¶ 14 On appeal, defendant contends that his trial counsel was ineffective for failing to file a pretrial motion to quash his arrest and suppress physical evidence, that he was not proven guilty of being an armed habitual criminal beyond a reasonable doubt, and that the armed habitual criminal statute violates the *ex post facto* clauses of the United States and Illinois Constitutions.

¶ 15 Defendant first contends that his trial counsel was ineffective for failing to challenge the illegal search that resulted in the seizure of the only physical evidence against him, namely the gun found inside Chambers-Carpenter's purse in her bedroom closet. He argues that the arrest

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warrant for Reed and the consent to search for Reed from Chambers did not give the police legal authority to search for the gun that was found in Chambers-Carpenter's closet. He contends that without the gun, there would have been no crime and counsel should have filed a pretrial motion challenging the illegal search and suppressing the physical evidence recovered from the illegal search. Defendant further argues, based upon two recent United States Supreme Court cases (*District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008); *McDonald v. Chicago*, ___ U. S. ___, 130 S. Ct. 3020 (2010)) that simply because a weapon was seized from the apartment (albeit unreasonably), there was no probable cause that a crime had been committed at that time.

¶ 16 To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation was deficient and that he was prejudiced by that deficiency. *People v. Johnson*, 372 Ill. App. 3d 772, 777 (2007), citing *Strickland v. Washington*, 466 U.S. 668 (1984). Where a defendant fails to satisfy *Strickland's* second prong by failing to show prejudice, the reviewing court need not determine whether *Strickland's* first prong of deficient performance has been met. *Johnson*, 372 Ill. App. 3d at 777. A defendant is prejudiced if there is a reasonable probability that the outcome of the trial would have been different or that the result of the proceeding was unreliable or fundamentally unfair. *Johnson*, 372 Ill. App. 3d at 777.

¶ 17 The decision whether to bring a motion to quash arrest and suppress evidence is considered trial strategy, and trial counsel enjoys the strong presumption that failure to challenge the validity of the defendant's arrest or to move to exclude evidence was proper. *People v. Spann*, 332 Ill. App. 3d 425, 432 (2002). To establish prejudice in the context of counsel's

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failure to file a motion to suppress, a defendant must show a reasonable probability that the motion would have been granted and the outcome of the trial would have been different had the evidence been suppressed. *People v. Morales*, 339 Ill. App. 3d 554, 563 (2003). Reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. *Spann*, 332 Ill. App. 3d at 433. The law is well-settled that the decision whether to file a motion to quash arrest and suppress evidence does not represent *per se* incompetence (*People v. Little*, 322 Ill. App. 3d 607, 611 (2001)), but each case must be judged on the circumstances presented therein (*People v. Moore*, 307 Ill. App. 3d 107, 111 (1999)). The question of whether there is a reasonable probability that the result of the proceeding would have been different absent counsel's unprofessional errors does not rest upon whether there was sufficient evidence remaining to convict a defendant. *Moore*, 307 Ill. App. 3d at 111. The test is whether a defendant received a fair trial, *i.e.*, one that results in a verdict worthy of confidence. *Moore*, 307 Ill. App. 3d at 111.

¶ 18 Turning to this case, there is no question that the police lawfully entered the apartment based on the arrest warrant for Reed or that it was proper for them to conduct a search for Reed within the apartment, including the closet. However, the police searched a zippered handbag on the top shelf of the closet, a place where it was unreasonable to think that the subject of the arrest warrant would be, and recovered a gun. Although the testimony conflicted as to whether defendant was arrested in the apartment or at the police station, the arrest took place before the inculpatory statement was made. The only connection between defendant and the gun was his subsequent admission at the police station after his arrest that the gun belonged to him.

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A pretrial motion to suppress would have been counsel's strongest and most likely wisest course of action. We conclude that trial counsel's failure to file a pretrial motion to quash and suppress evidence fell below an objective standard of reasonableness. We can see no valid reason for counsel's attempt to file a motion after defendant's trial and conviction instead of filing it prior to trial, because there was no possibility that a post-trial motion to suppress could have been granted after the trial and defendant had been convicted.

¶ 19 We now determine whether this failure to present a pretrial motion to quash and suppress prejudiced defendant. As noted previously, to demonstrate prejudice, a defendant must show that there is a reasonable probability that the outcome of the trial would have been different had defendant's trial counsel filed a pretrial motion to suppress evidence seized during the search of the closet and zippered handbag while police were executing an arrest warrant instead of attempting to file such a motion after defendant's conviction. *Little*, 322 Ill. App. 3d at 611. We note that this standard does not require a defendant to demonstrate that counsel's conduct more likely than not altered the outcome of the case. *People v. Patterson*, 192 Ill. 2d 93, 122 (2000).

¶ 20 Upon review of the facts contained in the record, we conclude a motion to quash and suppress would have had a reasonable probability of success at trial. Here, the evidence at trial indicated that officers arrived at the apartment to execute an arrest warrant for Reed. When they arrived at the apartment, Chambers allowed them to search for Reed. During the search, when asked whether there were any weapons in the apartment, it was brought to the officers' attention by defendant that there was a gun located inside a purse in a bedroom closet, which was subsequently recovered. Entry for purposes of executing a valid arrest warrant necessarily entails

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remaining within the residence for a reasonable amount of time to carry out the purposes of the warrant, *i.e.*, to conduct a search for the subject of the warrant (citation), to perform a protective sweep (citation), or conduct a search incident to a valid arrest for protection of the police and preservation of the evidence (citation). *People v. Coleman*, 194 Ill. App. 3d 336, 341 (1990).

Here, the officers did not have a warrant for defendant's arrest.

¶ 21 Had the motion been filed, there is a reasonable probability it would have been successful, and defendant's inculpatory statement at the police station would not have been admitted at trial. Had defendant's statement not been admitted at trial, based on the record before us, we find that there is a reasonable probability that the result of the trial would have been different because defendant's presence in the apartment and knowledge of where a gun was located in the apartment, without more, would not have been sufficient to show defendant's constructive possession of the gun. See *People v. Hill*, 2012 IL App (1st) 102028, ¶ 10 (fact that felon was in apartment and knew where gun was located is insufficient for constructive possession). Accordingly, we find that defendant was prejudiced by counsel's failure to file a pretrial motion to quash and suppress. While we make no determination as to the ultimate success of defendant's motion, we do find a reasonable probability of success had the motion been presented. See *Patterson*, 192 Ill. 2d at 122-23; *Little*, 322 Ill. App. 3d at 613.

Accordingly, we find that defendant received the ineffective assistance of trial counsel and we remand this cause to the trial court for defendant to file such a motion and for the trial court to conduct a suppression hearing, where the trial court will be tasked with determining whether such a motion should ultimately be granted after the record is fully developed. If the trial court

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grants the motion and excludes the evidence, a new trial is ordered. See *In re A.R.*, 295 Ill. App. 3d 527, 535 (1998).

¶ 22 To quell any double jeopardy concerns, we will now address defendant's attack on the sufficiency of the evidence. *People v. Digirolamo*, 179 Ill. 2d 24, 42 (1997).

¶ 23 When reviewing the sufficiency of the evidence in a criminal case, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 407 Ill. App. 3d 931, 934 (2011). A judgment of conviction will be overturned on appeal only when the evidence is so unreasonable, improbable or unsatisfactory as to raise a reasonable doubt of the defendant's guilt. *Little*, 322 Ill. App. 3d at 614.

¶ 24 Section 24-1.7 of the Criminal Code of 1963 states:

"(a) A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted a total of 2 or more times of any combination of the following offenses:

(1) a forcible felony as defined in Section 2-8 of this Code;

(2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child; intimidation;

aggravated intimidation; gunrunning; home invasion; or
aggravated battery with a firearm; or
(3) any violation of the Illinois Controlled Substances Act
or the Cannabis Control Act that is punishable as a Class 3
felony or higher.

(b) Sentence. Being an armed habitual criminal is a Class
X felony." 720 ILCS 5/24-1.7 (West 2010).

¶ 25 The State must prove the prior convictions and the present conduct beyond a reasonable doubt. *People v. Adams*, 404 Ill. App. 3d 405, 412 (2010). A trier of fact is entitled to rely on reasonable inferences of knowledge and possession. *Ross*, 407 Ill. App. 3d at 935.

¶ 26 The elements of the offense are as follows: (1) possession of a firearm; and (2) at least two prior convictions for certain enumerated offenses. *Ross*, 407 Ill. App. 3d at 943. Here, the State presented certified copies of defendant's two prior convictions, one for possession with intent to deliver and one for aggravated unlawful use of a weapon. Thus the issue for our determination is whether defendant possessed the gun.

¶ 27 Under Illinois law, proof of an offense requires proof of two distinct propositions or facts that a crime was committed by the person charged. *People v. Hurry*, 2012 IL App (3d) 100150, ¶ 11. While defendant's confession may be integral to proving the *corpus delicti*, it is well established that proof of the *corpus delicti* may not rest exclusively on defendant's extrajudicial confession, admission, or other statement. *Hurry*, 2012 IL App (3d) 100150, ¶ 11. If there is evidence of corroborating circumstances which tend to prove the *corpus delicti* and correspond

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with the circumstances related in the confession, both the circumstances and the confession may be considered in determining whether the *corpus delicti* is sufficiently proved in a given case.

Hurry, 2012 IL App (3d) 100150, ¶ 11. However, under the corroboration rule, the independent corroborating evidence must relate to the specific events on which prosecution is predicated.

Hurry, 2012 IL App (3d) 100150, ¶ 11.

¶ 28 Here, the evidence presented at trial through both officers' testimony established that as the police entered the residence searching for Reed pursuant to an arrest warrant, defendant volunteered that there was a gun present and supplied the exact location of it. After the gun was retrieved, both officers heard defendant tell Chambers that he was a felon and could not go back to jail. Moreover, Officer Hayes testified that defendant, while at the police station, stated that the gun was his and that he had it for protection. The defendant's inculpatory statement made after his arrest was not the only evidence that he possessed a gun. It was defendant's post-arrest statement combined with defendant's knowledge that a gun was present in the apartment occupied by him which was sufficient to prove defendant possessed a gun. Accordingly, we find the evidence sufficient. While the evidentiary record is not overwhelming on the issue of possession, we conclude that when the evidence is viewed as a whole and in a light most favorable to the State, it is sufficient to support defendant's conviction.

¶ 29 Finally, defendant also contends that his conviction violated the *ex post facto* clauses of the United States and Illinois Constitutions because one of his qualifying convictions occurred before the effective date of the statute. However, we have found that defendant was prejudiced by counsel's failure to file a pretrial motion to quash and suppress and remanded this case to

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allow a motion to be filed and hearing conducted. We have also ordered that a new trial for defendant be held if the motion to suppress is granted. Therefore we will not consider this constitutional issue at this time ("...a court of review should consider the constitutionality of a statute as a matter of last resort, only after the resolution of any other nonconstitutional and constitutional grounds for disposing of the case"). *People v Carpenter*, 228 Ill. 2d 250, 264 (2008).

¶ 30 Accordingly, we remand this cause to the trial court for defendant to file a motion to suppress and for the trial court to conduct a suppression hearing. The trial court will be tasked with determining whether such a motion should ultimately be granted after the record is fully developed. If the trial court grants the motion and excludes the evidence, a new trial is ordered and the judgment of conviction is vacated; otherwise this case should be returned to the appellate court for consideration of all remaining issues.

¶ 31 CONCLUSION

¶ 32 For the foregoing reasons, the case is remanded for further proceedings consistent with this decision.

¶ 33 Jurisdiction retained; remanded for suppression hearing.