

No. 1-11-3616

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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 19031
)	
LASHAWN HORTON,)	The Honorable
)	Mary Margaret Brosnahan
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's motion to quash arrest and suppress evidence found in the bedroom of an apartment where the apartment's resident had apparent authority to consent to the search. In addition, the unlawful use of a weapon by a felon statute (720 ILCS 5/24-1.1 (West 2010)) did not violate the second amendment. Furthermore, defendant was not entitled to a new sentencing hearing.

¶ 2 Following a jury trial, defendant Lashawn Horton was convicted of unlawful use of a weapon by a felon (UUWF) and sentenced as a Class X offender to 12 years' imprisonment. On

appeal, defendant asserts that 1) the trial court erred in denying his motion to quash arrest and suppress evidence; 2) the UUWF statute violates his second amendment right to bear arms; and 3) the trial court improperly considered his possession of a weapon and potential use of the weapon for self-defense as aggravating factors at sentencing. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Defendant was charged with committing UUWF in that he "knowingly possessed in his own abode a firearm, after having been previously convicted of the felony offense of aggravated robbery under case number 05C4-40335." 720 ILCS 5/24-1.1(a) (West 2010). Before trial, defendant filed a motion to quash arrest and suppress evidence. The issue was whether a resident, Shaundra Williams, gave the police effective consent to search the bedroom where defendant was found with a gun. At a hearing on defendant's motion, Officer Nick Zattair testified that at approximately 11:45 p.m. on September 28, 2010, he, Officer Paul Kirner and Sergeant Raymond McInerney went to a two-unit residential building at 8112 South Loomis. When the police arrived, they saw that the second-floor door at the rear of the building was off of its hinges and barricaded from the inside. Officer Zattair eventually went through the common front door to the building and spoke to Williams, who stated that she lived on the first floor but the building's residents were being evicted.

¶ 5 Before the police searched the residence, Officer Zattair asked Williams if she would consent to the search. To that end, she signed a consent-to-search form. Her boyfriend Jeffrey Kemp was also present and signed the form as a witness. Officer Zattair then searched the first-floor apartment, which contained a dining room, bathroom, kitchen and at least two bedrooms. Next to the kitchen, the police encountered a locked door. When Sergeant McInerney knocked, defendant opened the door and was patted down. Sergeant McInerney then looked through the

bedroom, which contained male clothing, and recovered a handgun from under the mattress.

Defendant was taken into custody and made a statement. At some point, Officer Zattair learned that defendant had been staying in the apartment for two days but Officer Zattair did not specify when he learned that information.

¶ 6 Following that hearing, the trial court denied defendant's motion, finding that only Williams and Kemp were leaseholders, that defendant was staying in the apartment for a couple of days, and that defendant did not have his own separate bedroom requiring his specific consent to search. Accordingly, Williams' consent to search the bedroom was effective. The trial court subsequently reopened defendant's pretrial motion, however, at defense counsel's request.

¶ 7 At the second hearing on defendant's motion, Williams testified that her father owned the building at 8112 South Loomis and she had lived there her entire life. On the day in question, she was living in the first-floor apartment with Kemp, although she did not actually rent the apartment. Her father had asked the second-floor tenants to leave but had never asked her to leave. At about 11 p.m., she was cooking in the kitchen while Kemp watched a baseball game with his friend. Williams clarified that Kemp's friend was not defendant. Williams then saw someone go upstairs to the second floor, apparently via the rear of the building. Upon investigation, she encountered two police officers, one of whom said she lived in an abandoned building. Williams responded that the building was not abandoned and was owned by her father. When the police asked who was in the building with her, she said that her boyfriend and his friend were watching the game.

¶ 8 Williams subsequently let the police into her apartment. In the dining room, she, Kemp and his friend showed the police identification. At that time, Williams did not know whether defendant was home, but she had rented a room to him. Williams had originally rented a second-

floor bedroom to defendant, who had paid rent, but Williams' father wanted the second floor to be vacated as of that night. Accordingly, they arranged for defendant to spend the remaining two days of the month in a first-floor bedroom. Before defendant moved his belongings downstairs that morning, the bedroom in question was empty. Defendant's girlfriend Faye had also been staying with him. After the police searched Williams' home, she complied with their request for her to sign a consent-to-search form.

¶ 9 Sergeant McInerney testified, in pertinent part, that after knocking for several minutes, apparently on the back door to the building, Williams answered but said she could not let them in that entrance. When the officers got to the front of the residence, Williams told them that the apartment was hers and that her father was evicting her. She let the police inside her first-floor apartment, where she and Kemp provided identification. Williams then signed a consent-to-search form, which Kemp also signed as a witness. During a search of the apartment, a handgun was recovered from the bedroom defendant was staying in. The bedroom door had been locked but Sergeant McInerney did not ask for defendant's permission to search the room.

¶ 10 Kemp testified that on September 28, 2010, he, Williams, defendant and his girlfriend lived at the address in question. Defendant and his girlfriend had rented a first-floor bedroom from Williams that day. In addition, Kemp testified that defendant had also brought his clothes downstairs from the second floor that day but clarified that defendant had not actually been living upstairs. At about 11 p.m., the police appeared at the apartment while Kemp was watching a baseball game with a friend. Defendant was in his room at the time. After the police searched the apartment, Kemp was presented with a consent-to-search form.

¶ 11 Following this new testimony, the trial court again denied defendant's motion, finding that the form was signed before the search, that no one testified defendant had keys to the

apartment or that the bedroom had a lock that particularly distinguished it from other areas of the apartment. The court also found that Williams was making money from her father's building on the side and let defendant stay on the first floor because he had already given her money.

Furthermore, the court found that defendant had not spent one night there, was not a leaseholder, and was simply going to become an overnight guest.

¶ 12 At trial, Officer Zattair provided additional details regarding his encounter with defendant. He testified that after defendant opened the bedroom door, Sergeant McInerney explained why the police were there and brought defendant to Officer Zattair for a protective pat down. Defendant was cooperative and did not try to prevent the police from entering the bedroom. In addition, Sergeant McInerney then entered the bedroom, which contained a bed, and a small nightstand or dresser, and recovered a loaded handgun from under the mattress. Sergeant McInerney also found defendant's personal documents and men's clothing. Officer Zattair further testified that the room did not contain any women's clothing, although Sergeant McInerney did not examine every piece of clothing. After defendant was *Mirandized* and handcuffed, he said he had been staying in the bedroom for a couple of days and kept a handgun because he had previously been shot.

¶ 13 Sergeant McInerney testified that Williams agreed to the officers' search of the apartment and clarified that Kemp also told the police he lived there. During the search, the police discovered that a door off of the kitchen was locked and asked Williams if anyone was inside or why the door was locked. Williams responded only that she did not know if anyone was inside. Sergeant McInerney then knocked on the door, which defendant opened. The room contained a makeshift shelf with deodorant, men's cologne, men's clothing, a bed and documents bearing defendant's name, but Sergeant McInerney did not see any women's clothing. After the gun was

recovered from under the mattress, defendant said he had the gun for protection because he had previously been shot.

¶ 14 Williams testified that she was living on the first floor with Kemp but the other residents had been evicted or were required to leave. Before the day in question, defendant had paid monthly rent to Williams to stay on the second floor "and he still had some time left" but he too was required to leave. As a result, Williams told defendant he could stay on the first floor with her and Kemp but did not give him a key to the apartment. In addition, Williams first testified that everyone had a key to his or her own room and one could not enter defendant's room without a key unless he "popped the lock." Williams then testified, however, that a key was not necessary to enter defendant's room. Defendant did not have a key to the room but could lock the door from the inside. Before defendant moved his belongings to the first floor on the morning in question, the bedroom was empty. The parties then stipulated that defendant had a prior qualifying conviction. Following trial, the jury found defendant guilty of UUWF and he was sentenced as a Class X offender to 12 years in prison.

¶ 15 II.ANALYSIS

¶ 16 On appeal, defendant asserts that Williams lacked authority to consent to the search of defendant's locked room. A trial court's factual determinations and credibility assessments in ruling on a motion to suppress will be reversed only where such findings are against the manifest weight of the evidence. *People v. Huffar*, 313 Ill. App. 3d 593, 596 (2000). We review the trial court's ultimate question of whether suppression is warranted *de novo*. *People v. Follis*, 2014 IL App (5th) 130288, ¶ 19. Moreover, a reviewing court can consider both the evidence adduced at the pretrial hearing on a defendant's motion and the evidence adduced at trial. *People v. Richardson*, 234 Ill. 2d 233, 252 (2009).

¶ 17 The fourth amendment generally prohibits the warrantless search of an individual's home but such search is constitutional if conducted with the voluntary consent of a third party who has common authority over the premises. *Huffar*, 313 Ill. App. 3d at 596. In addition, whether a third party's consent is effective is not a question of property law. *People v. Bull*, 185 Ill. 2d 179, 197 (1998); see also *People v. Mahaffey*, 166 Ill. 2d 1, 25 (1995) (finding that "Payment of money by the defendant to Morriell Redmond for use of the bedroom does not preclude a finding that Redmond was authorized to consent to a search of the entire premises"). On the contrary, such authority is rooted in the mutual use of the property by persons who generally have joint access or control over the property for most purposes. *Bull*, 185 Ill. 2d at 197. This is because a defendant assumes the risk that an individual with common authority over his property will allow the police to search that property. *People v. Miller*, 346 Ill. App. 3d 972, 985 (2004).

Accordingly, a defendant and a third party share common authority only where the third party's degree of control is equal to or greater than the defendant's control, regardless of the individuals' relationship or the commingling of their belongings. *Huffar*, 313 Ill. App. 3d at 596.

Furthermore, the State has the burden of demonstrating that common authority existed. *Bull*, 185 Ill. 2d at 197.

¶ 18 With that said, a third party who does not have actual common authority may nonetheless have apparent common authority. *Huffar*, 313 Ill. App. 3d at 597. Apparent authority exists where the circumstances known to the police when entering would warrant a person of reasonable caution to believe that the consenting individual had authority over the premises. *Miller*, 346 Ill. App. 3d at 986. An officer may not rely on a third party's apparent authority, however, where the officer fails to inquire under circumstances that require further inquiry. *Huffar*, 313 Ill. App. 3d at 598. In addition, the objective determination of consent must be

based on facts known to the officer when the consenting party had the alleged authority over the premises. *People v. Pickens*, 275 Ill. App. 3d 108, 113 (1995). While an officer must always be reasonable, he is not required to always be correct. *Pickens*, 275 Ill. App. 3d at 113.

¶ 19 Here, at a minimum, Williams had apparent authority to consent to the search of defendant's room. The record suggests that the police encountered Williams on both floors and thus, she would have appeared to have had access to the entire building. In addition, Williams told the police that she lived in the building that was owned by her father. She also indicated that everyone else, with the exception of Kemp perhaps, was required to leave. As a result, the police had no reason to believe anyone else lived there. In contrast, the police had every reason to believe at that time that Williams controlled the entire first floor apartment, including the bedroom in question, and that her access and control of that room for most purposes was superior to anyone else's access and control.

¶ 20 No evidence showed defendant's bedroom was in any obvious way separated from the rest of the apartment so as to suggest that someone else might have superior access to it. The ability to temporarily lock a door only from the inside does not suggest an ability to prevent access to the room for most purposes. Similarly, even fleeting visitors may have reason to temporarily lock a door. In addition, when the police initially asked Williams who was in the apartment, she identified only Kemp and his friend. Sergeant McInerney testified at trial that when he discovered the bedroom door was locked, he asked Williams whether anyone was inside. She did not inform him that someone lived there and instead, merely stated that she did not know if anyone was inside. Thus, the police had no reason to believe that anyone found inside might have superior access to and control of the room. When defendant opened the door, he did not initially object to the search or state that he lived there. Based on the information

known by the police at that time, it is entirely conceivable that the individual was only another friend who had come over to watch the game and needed a moment of privacy. Defendant's presence alone did not create the ambiguity necessary to require further inquiry.

¶ 21 The fact that documents bearing defendant's name and men's clothing were found *after* the search commenced is not indicative of what a person of reasonable caution would believe when entering the room and beginning the search. In addition, it is not clear whether those items were found before or after the gun was discovered. Similarly, while Officer Zattair testified that defendant said he was staying in the bedroom a couple of days, it appears that defendant made that statement after the search. In any event, the trial court believed Kemp's testimony that defendant had not yet spent a single night there. Based on the facts known to the officers at the time of the search, Williams had apparent authority to consent to the search of the bedroom. We need not consider defendant's contentions based on facts that were not within the officers' knowledge at that time.

¶ 22 In reaching this conclusion, we are unpersuaded by defendant's reliance on *Miller*. There, a third-party, on whose consent the police relied, told the police that a duffel bag belonged to the defendant. *Miller*, 346 Ill. App. 3d at 976, 984. The duffel bag was in a cabinet which the third party authorized the police to search. *Id.* 982-84. In addition, the reviewing court found that the duffel bag was an enclosed space, as it was by definition used to store personal belongings. *Id.* at 984. Furthermore, the reviewing court concluded that the third-party lacked actual authority to consent to a search of the bag because no evidence showed the defendant conferred upon the third party joint access to or control of the bag. *Id.* at 987. The court also found there was no apparent authority to consent because the third party had immediately stated that the duffel bag

belonged to someone else, requiring the officers to make additional inquiries which the officers did not make. *Id.* at 987-88.

¶ 23 Unlike *Miller*, the case before us does not involve a container. The bedroom, albeit an enclosed space, is clearly not a container and we categorically reject any suggestion that the space under the mattress itself could constitute a closed container, as mattresses are not primarily intended to store personal effects. In addition, Williams never disavowed access to or control of the bedroom and mattress. As discussed, her initial statements to the police indicated that she did have control and access to that bedroom, as everyone else had been evicted. Furthermore, we are equally unpersuaded by defendant's reliance on *People v. Bochnaik*, 93 Ill. App. 3d 575, 576-77 (1981), as that decision did not recognize the apparent authority doctrine. Accordingly, the trial court properly denied defendant's motion under the circumstances before us.

¶ 24 Next, defendant asserts that the UUWF statute violates the second-amendment right to bear arms by criminalizing a felon's possession of a firearm for self-defense. Defendant acknowledges, however, that this court has rejected second amendment challenges to the statute, as a felon's right to bear arms may be curtailed. *People v. Campbell*, 2014 IL App (1st) 112926, ¶¶ 52-60; *People v. Garvin*, 2013 IL App (1st) 113095, ¶¶ 27-43; *People v. Robinson*, 2011 IL App (1st) 100078, ¶¶ 10-31; *People v. Spencer*, 2012 IL App (1st) 102094, ¶¶ 23-32. We find no reason to depart from those decisions. Accordingly, we reject defendant's contention.

¶ 25 Finally, defendant asserts the trial court improperly considered his possession of a weapon for self-defense as an aggravating factor because this factor was inherent in the offense and violated his second-amendment right to self-defense. As a threshold matter, the parties dispute whether defendant forfeited this issue and whether plain error applies. Forfeiture aside, we find no reversible error.

¶ 26 A reviewing court will not reverse a sentence falling within the permissible sentencing range absent an abuse of discretion. *People v. Miller*, 2014 IL App (2d) 120873, ¶ 36. In addition, a factor implicit in an offense generally cannot be used as an aggravating factor at sentencing. *People v. Walker*, 392 Ill. App. 3d 277, 300 (2009). This rule should not be applied rigidly, however, because public policy requires a sentence to be varied based on the circumstances of the offense. *People v. Spicer*, 379 Ill. App. 3d 441, 468 (2008). In determining whether the sentence imposed by the court was proper, we will not consider the court's statements in isolation. *Walker*, 2012 IL App (1st) 083655, ¶ 30. Furthermore, when the trial court has considered an improper sentencing factor, resentencing is not necessary if the weight given to the factor did not lead to a greater sentence. *People v. McPhee*, 256 Ill. App. 3d 102, 114 (1993).

¶ 27 Here, defendant was found guilty of UUWF, which ordinarily would have been a Class 2 felony (720 ILCS 5/24-1.1 (West 2010)), but was required to be sentenced as a Class X offender based on his extensive criminal background (730 ILCS 5/5-4.5-95 (West 2010)). Accordingly, the trial court was required to sentence defendant to a term of between 6 and 30 years in prison. 730 ILCS 5/5-4.5-25(a) (West 2010). Not only is defendant's 12-year sentence well within that range, but it falls toward the more lenient end of the spectrum. Defendant nonetheless contends that the trial court's comments showed that it considered improper aggravating factors.

¶ 28 In discussing the mitigating factors, the trial court stated, improperly according to defendant, that "any time there is a weapon that is present that is found to be under the control of the defendant, I would say that qualifies as a serious offense that could possibly threaten serious physical harm to another." The court's comment merely reflected its finding that the potential mitigating factor based on the absence of physical threat was not present in this case, not a

finding that an aggravating factor was present. In addition, the court acknowledged in mitigation that that defendant had not posed an eminent threat by pointing his gun at someone, but apparently qualified that observation so as not to minimize the general seriousness of a UUWF offense, stating, "being in control of a weapon couldn't be characterized as anything other than dangerous." Furthermore, the court essentially found that the mitigating factor that applies where a defendant did not contemplate that his conduct would threaten serious harm did not apply in this instance. Specifically, the court stated, "I don't know why else one would have a gun unless you were looking to protect yourself and be ready to pull it and draw it to protect yourself and be ready to pull it and draw it if you felt you were under some type of threat or attack." In context, these comments were clearly made by the trial court while contemplating potential mitigating factors, not aggravating factors. Accordingly, the court did not improperly consider aggravating factors inherent in the offense. Furthermore, defendant's contention that the court improperly considered defendant's exercise of his right to bear arms as an aggravating factor presumes that he has such a right. As discussed above, his right has properly been curtailed. We find no abuse of discretion.

¶ 29 Even assuming the court considered improper aggravating factors, the record shows that the weight given to the challenged observations did not result in a greater sentence. The trial court considered all statutory mitigating and aggravating factors, not just the aforementioned factors. 730 ILCS 5/5-5-3.1 (West 2010); 730 ILCS 5/5-5-3.2 (West 2010). In addition, the trial court focused on defendant's criminal history. The presentence investigation report indicated that in addition to the aggravated robbery conviction used to satisfy the felony element of the offense, defendant had three prior convictions for burglary, and three prior retail theft convictions. Defendant also had felony convictions for theft, possession of burglary tools,

possession of drug paraphernalia, and possession of a controlled substance with intent to deliver, as well as a misdemeanor conviction for attempted possession of a controlled substance.

Furthermore, the trial court stated, "[r]espectfully I can't even remotely consider going near the minimum in this case. I mean, he's got now eleven felonies. This is an incredible amount."

Notwithstanding this statement, the court did approach the minimum sentence. This demonstrates that the challenged observations did not lead to a greater sentence. Accordingly, defendant is not entitled to a new sentencing hearing.

¶ 30 For the foregoing reasons, we affirm the trial court's judgment.

¶ 31 Affirmed.