2016 IL App (1st) 122343-UB

FIFTH DIVISION
December 30, 2016

No. 1-12-2343

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. 12 CR 07716
	)	
JOSHUA TOLBERT,	)	Honorable
	)	Dennis Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Vacating conviction on one count of aggravated unlawful use of a weapon (AUUW) based on *People v. Aguilar*, 2013 IL 112116; affirming conviction on second AUUW count.

¶ 2 Following a bench trial, defendant Joshua Tolbert was convicted of two counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (a)(3)(I) (West 2012)). On appeal, Tolbert advanced five arguments: (1) his conviction under section 24-1.6(a)(1), (a)(3)(A) should be vacated in accordance with *People v. Aguilar*, 2013 IL 112116; (2) his conviction under section 24-1.6(a)(1), (a)(3)(I) for possessing a handgun while under 21

years of age should be vacated because the statute is facially unconstitutional; (3) the State failed to prove all of the elements of the AUUW offenses; (4) the State's charging instrument was fatally defective; and (5) defense counsel was ineffective. In a prior unpublished order, we concluded that the charging instrument failed to allege an essential element of the AUUW offenses, *i.e.*, that the defendant was not an invitee. We thus reversed the judgment of the trial court. *People v. Tolbert*, 2014 IL App (1st) 122343-U. The Illinois Supreme Court allowed the State's petition for leave to appeal (Ill. S. Ct. R. 315 (eff. July 1, 2013)) and held that we erred in concluding that the invitee requirement is an element of the offense of AUUW. *People v. Tolbert*, 2016 IL 117846, ¶ 20. The Illinois Supreme Court vacated our judgment and remanded the matter for our consideration of defendant's remaining arguments. *Id.* ¶ 22. For the reasons discussed herein, defendant's conviction under section (a)(3)(A) is vacated and the remainder of the trial court's judgment is affirmed.

¶ 3 BACKGROUND

¶ 4 Defendant, then 17 years old, was arrested on April 8, 2012, and subsequently charged by information with three counts of AUUW. Each count alleged defendant "knowingly carried on or about his person, a firearm, at a time when he was not on his own land or in his own abode or fixed placed of business." Count 1 alleged a violation of section 24-1.6(a)(1), (a)(3)(A), in that "the firearm possessed was uncased, loaded and immediately accessible at the time of the offense." Count 3 alleged a violation of section 24-1.6(a)(1), (a)(3)(I), in that defendant was "under twenty one years of age and in possession of a handgun." The State did not prosecute Count 2, which alleged that defendant had not been issued a currently valid Firearm Owner's Identification (FOID) Card. See 720 ILCS 5/24-16(a)(1), (a)(3)(C) (West 2012).

¶ 5 Defendant, through his counsel, filed a motion *in limine* to preclude the State from

eliciting any hearsay statements which led police to the location where defendant was arrested. At a hearing on the motion, the State proffered that "the officer would testify that they go to the location of [the 7700 block of] South Seeley as a result of a man with a gun call." In granting the motion, the court informed counsel, "You could say they just went there in response to a radio call."

¶ 6 The trial testimony of Chicago police officer Matthew Sedory (Sedory) included the following. After receiving a call, he and his partner arrived in a marked Chicago police vehicle at the 7700 block of Seeley Avenue (Seeley) at approximately 11:45 p.m. on April 7, 2012. He described the Seeley address as a single-family residence with a "gated[-]in front yard." The front yard was surrounded by a six-foot wrought iron fence with a single entrance gate "leading down the main pathway right up to the stairs." Sedory was able to view through the gate because the bars of the gate are separated. The street lights at the location were functioning that evening.

¶ 7 As Sedory exited his vehicle, he observed defendant, who he identified in court. Defendant was "inside the front yard, inside the gate," approximately eight to ten feet from Sedory and five feet from the house and the porch. Sedory observed "one other male inside the front yard gated section," who was farther from the house than defendant. In addition, approximately four other males and three or four females were outside the gate to the left and right of the property.

¶ 8 After watching defendant "walking hurriedly away from the property," Sedory ordered him to exit the yard. Sedory and his partner detained all of the individuals at the scene. When the individuals were detained, Sedory entered the front gate of the residence and performed a search of the immediate area using his flashlight. He did not recover any items from that area. Sedory next looked up the steps and on the porch. On the porch, "behind the sub wall of the

steps," he found a black Ruger 9-millimeter handgun with an extended clip that held approximately 30 rounds. According to Sedory, the weapon "had 14 live rounds in it, one in the chamber." The weapon was on the ground in front of a chair.

¶ 9 Sedory did not immediately recover the handgun. When he exited the property and called for assistance, the property was secured such that no one could access the firearm. Approximately two minutes later, "assist units" arrived, including Officer Garza (Garza). Sedory then recovered the handgun and returned to the area where defendant was detained. Although defendant initially did not speak to Sedory, he subsequently informed the officer that "it was his gun." Based on his statement, defendant was transported to the police station.

¶ 10 In an "enclosed room" at the police station, Sedory spoke with defendant after 1:00 a.m. on April 8, 2012. Defendant stated that "he had the gun – he carries the gun for protection. He had the gun in his waistband when he went over there. When he saw us, he placed the gun on the steps." While processing defendant, Sedory learned defendant's name, his birthdate, and his home address, which was on the 8300 block of South Hoyne Street.

¶ 11 During cross-examination, Sedory confirmed that he never saw defendant on the porch. Sedory was questioned regarding his testimony at the preliminary hearing, wherein he testified that defendant was approximately 15 feet from the porch when Sedory initially observed him. Sedory agreed with defense counsel's statements that "somewhere between 5 and 15 feet perhaps would be a more fair estimation of where [defendant] was." He also testified that the second individual in the yard, an 18-year-old male named Anthony Jameson (Jameson), had been arrested. Sedory estimated that approximately twelve individuals near the Seeley address appeared to be roughly the same age. Sedory was not aware whether the recovered handgun was tested for fingerprints or DNA. On redirect examination, Sedory testified that he had knocked on

the door of the Seeley address, and an individual answered. As a result of that conversation, Jameson was arrested for criminal trespass to land.

¶ 12 Officer Garza testified that he and his partner arrived at the 7700 block of South Seeley to assist with an arrest; Garza identified defendant in court. After speaking with Sedory, defendant was arrested and transported to the police station. Garza advised defendant of his *Miranda* rights, defendant indicated his understanding, and then Garza and Sedory spoke with defendant in the processing area of the station. Defendant stated that the weapon was his, that he carried it for protection, and that when the police had arrived he had moved the handgun from his waistband to the location where it was found. On cross-examination, Garza testified, in part, that defendant was being detained when Garza arrived at the scene. At that time, defendant was "facing the actual residence outside on the fence" on the sidewalk.

¶ 13 After the State rested, defense counsel moved for a directed finding and presented a motion regarding the *corpus delicti* rule. Defense counsel asserted there was no "independent corroborative evidence" and "the only evidence of possession in this case" was defendant's statement. The assistant State's Attorney (ASA) responded that "[t]he fact that the gun is found in a location where the Defendant indicated he placed it is corroborative of the Defendant's statement." The ASA also argued that defendant was the "closest person to where the gun is located and then there's direct evidence of possession when he tells the officer he had the gun, where he had the gun, where he put the gun, and why he had it." The court denied the motion.

¶ 14 The trial court found defendant guilty of both counts and merged Count 1 into Count 3. During a hearing on a motion for a new trial, defense counsel reasserted *corpus delicti*, contending that no one witnessed defendant touching the weapon. Counsel argued, in part:

> "Now, there is nothing to corroborate that because the crime is possession

> of [a] weapon. Now, without going into a history of the corpus [delicti] rule the evidence also showed in this case that there was an 18-year-old with him that was also arrested, which is one of the reasons why the corpus [delicti rule] is in place. Sometimes people confess to crimes to protect others. He is 17 years old. He is probationable. The 18-year-old would not be. Is it possible that he confessed to it to protect the 18-year-old friend? Yes. That's a possibility. However, that doesn't mean he is guilty of possessing a weapon. It means he is guilty of confessing to possessing a weapon ***."

Observing that there was "absolutely no evidence" as to "the reason why he confessed" and that there was corroboration for his confession, *i.e.*, the recovered weapon, the trial court denied defendant's motion for a new trial and sentenced him to two years of felony probation.

¶ 15 On appeal, this court entered an order reversing the judgment of the trial court because we concluded that the charging instrument lacked the requisite specificity. The Illinois Supreme Court vacated our judgment and remanded for our consideration of defendant's remaining contentions.

¶ 16 ANALYSIS

¶ 17 Defendant raises five arguments on appeal, which we address in turn.

¶ 18 First, defendant contends that his conviction on Count 1 under 720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2012), should be vacated as void *ab initio* in accordance with *People v. Aguilar*, 2013 IL 112116. As noted in our prior order and the Illinois Supreme Court opinion, the State has agreed. See *Tolbert*, 2016 IL 117846, ¶ 7. Accordingly, defendant's conviction on Count 1 is vacated.

¶ 19 Second, defendant argues that we must vacate his conviction on Count 3 under 720 ILCS

5/24-1.6(a)(1), (a)(3)(I) (West 2012), for possessing a handgun while under 21 years of age because the statute is facially unconstitutional. Defendant contends that the "Illinois prohibition on an 18-to-20-year old adult's right to defend himself in public lacks a plainly legitimate sweep, as it disarms an entire class of persons entitled to defend themselves with handguns, including adults." Subsequent to the parties' briefing herein, the Illinois Supreme Court in *People v. Mosley*, 2015 IL 115872, ¶ 38, held that subsection (a)(3)(I) does not violate the second amendment rights of 18- to 20-year-old persons. In light of *Mosley*, we reject defendant's constitutional challenge and consider his remaining arguments.

¶ 20 Third, defendant claims that the State failed to prove the required AUUW elements that when he possessed a firearm he was "not (1) at his own abode, legal dwelling, or fixed place of business, or (2) on the land or dwelling of another as an invitee." The applicable version of subsection 24-1.6(a)(1) provides that a person commits the offense of AUUW when he or she knowingly "[c]arries on or about his or her person or in any vehicle or concealed on or about his or her person except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission, any pistol, revolver, stun gun or taser or other firearm[.]" 720 ILCS 5/24-1.6(a)(1) (West 2012). Defendant initially argues that "[s]ince the State failed to prove the required element that [defendant] was not an invitee at [the South Seeley address] when he possessed a firearm, this Court should reverse his conviction." Our supreme court, however, squarely decided this issue on appeal:

> "The plain language of [720 ILCS 5/24-2 (West 2012)] establishes that the invitee requirement of section 24-1.6 was intended by the General Assembly to be an exemption to the offense of aggravated unlawful use of a weapon and not an

> element. It was therefore incumbent on the defendant to prove his entitlement to the exemption." *Tolbert*, 2016 IL 117846, ¶ 17.

Based on the foregoing, we reject defendant's contention that "the State failed to prove the required element that [defendant] was not an invitee." We further note that defendant presented no evidence at trial supporting his entitlement to the invitee exemption.

¶ 21 Defendant also contends that the State bore the burden of proving that he was not at his own abode at the time he possessed the firearm. During the trial, Officer Sedory testified that the address on South Seeley was a single-family residence. He further testified:

> [ASA]: "And, Officer, did you also as [*sic*] ascertain the home address of the Defendant during processing?
>
> [Sedory]: Yes, I did.
>
> [ASA]: Did you learn his address to be [South Hoyne], Chicago, Cook County, Illinois?
>
> [Sedory]: Yes, I did."

Defendant contends that Sedory's testimony, "based on unknown out-of-court statements, was inadmissible hearsay." According to defendant, "[t]he State's evidence was insufficient for any rational trier of fact to find the essential abode element of AUUW beyond a reasonable doubt."

¶ 22 The State contends, and we agree, that defendant has forfeited his claim by failing to object at trial or in his posttrial motion. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010) (noting that a defendant forfeits "ordinary appellate review of that error" if he fails to object to the error at trial and include the error in a posttrial motion). Defense counsel did not object to Sedory's testimony regarding defendant's address on Hoyne Avenue. His posttrial motion generically asserts that "[t]he State failed to prove every material allegation of the offense beyond a

reasonable doubt" and does not include a hearsay claim.

¶ 23 Even assuming *arguendo* that his claim was not forfeited, we do not consider Sedory's testimony regarding defendant's address to be inadmissible hearsay, as defendant contends. In *People v. Davis*, 103 Ill. App. 3d 792, 795 (1981), the defendant provided his address to a police officer during the booking procedure. On appeal, the defendant argued that the officer's testimony regarding the defendant's address should not have been admitted. *Id.* The appellate court concluded that the trial court's determination that the testimony was admissible as an admission did not constitute error. *Id.* As in *Davis*, we consider the statement at issue to constitute an admission.

¶ 24 When reviewing a challenge to the sufficiency of the evidence, we consider whether, 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. Wheeler*, 226 Ill. 2d 92, 114 (2007). Viewing the evidence in a light most favorable to the State, we conclude that a rational trier of fact could have found that defendant was not on his land, or in his "abode, legal dwelling, or fixed place of business," beyond a reasonable doubt. See 720 ILCS 5/24-1.6(a)(1) (West 2012). Sedory testified that the building on South Seeley was a single-family residence and that defendant's home address was on the 8300 block of South Hoyne Avenue. "The testimony of a single witness, if it is positive and the witness credible, is sufficient to convict." *People v. Rodriguez*, 2014 IL App (2d) 130148, ¶ 29. In sum, we reject defendant's contention that the State failed to prove the "abode" element beyond a reasonable doubt.

¶ 25 Fourth, defendant argues on appeal that the State's charging instrument was fatally defective where it failed to notify him of the "required [AUUW] element that when [defendant] possessed a firearm, he was not on the land or dwelling of another as an invitee." As discussed

above, the Illinois Supreme Court rejected this contention and vacated our prior decision. *Tolbert*, 2016 IL 117846, ¶ 22. In accordance with our supreme court's directive, we have considered defendant's remaining contentions herein.

¶ 26 Fifth, defendant argues that his trial counsel was ineffective for a number of reasons. The Illinois Supreme Court has adopted the two-part test of *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether a defendant was denied effective assistance of counsel. *People v. Bew*, 228 Ill. 2d 122, 127 (2008). To prevail on a claim on ineffective assistance, a defendant must establish both that his counsel was deficient and that such deficiency prejudiced the defendant. *Id.* To establish deficiency, a defendant must prove that counsel's performance, as "judged by an objective standard of competence under prevailing professional norms," was so deficient that counsel was not functioning as the "counsel" guaranteed by the sixth amendment. *Id*. at 127-28. The second step is to determine whether the defendant was prejudiced by the alleged deficiency. *Id*. at 128.

¶ 27 Defendant claims that counsel was ineffective for failing to object to the charging instrument and for failing to argue defendant's innocence where the State did not present evidence of "an element required for conviction." As discussed above, our supreme court has held that the invitee requirement is not an element of AUUW (*Tolbert*, 2016 IL 117846, ¶ 20) and "[t]he State had no obligation to include the invitee requirement in the charging instrument" (*id.* ¶ 17). The *Strickland* prongs thus are not satisfied. Even assuming *arguendo* that defense counsel was deficient by failing to argue that the State had not proven the "abode" element, the record does not demonstrate any prejudice to defendant. There was no indication in the record that the trial court was unaware of the element. See *People v. Howery*, 178 Ill. 2d 1, 32 (1997) (stating that the "trial court is presumed to know the law and apply it properly"). Furthermore,

as discussed above, the evidence presented at trial was sufficient to prove the element.

¶ 28 Defendant also contends that counsel was ineffective for failing to move to suppress his inculpatory statements. The decision whether to file a motion to suppress is generally a matter of trial strategy which is entitled to great deference. *Bew*, 228 Ill. 2d at 128. "In order to establish prejudice resulting from failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed." *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 29 Our supreme court has observed that where the defendant's claim of ineffectiveness is based on counsel's failure to file a suppression motion, "the record will frequently be incomplete or inadequate to evaluate that claim because the record was not created for that purpose." *People v. Henderson*, 2013 IL 114040, ¶ 22. Such is the case herein. Defendant argues that "the record reflects that Officer Sedory did not possess specific and articulable facts required to warrant a *Terry* stop." In accordance with the defense's motion *in limine*, Sedory testified that a "call that we had received" led him to the Seeley address. On appeal, defendant asserts that "the record is devoid of evidence that a dispatching officer possessed facts sufficient to establish reasonable suspicion." Defendant also notes that "[n]either the arrest report, the State, nor Officer Sedory offered any information about the caller's identity." The trial record is insufficient for us to evaluate defendant's claim of ineffective assistance of counsel. See also *Bew*, 228 Ill. 2d 122, 135 (2008) (noting the insufficiency of the record); *People v. Evans*, 2015 IL App (1st) 130991, ¶ 34 (declining to consider the defendant's claim of ineffective assistance of counsel "because the record is devoid of evidence that would allow this court to adjudicate whether trial counsel's decision not to file a motion to suppress was strategic, whether the motion would have been

granted, or whether [the police officer] acted lawfully under the circumstances").

¶ 30 For the same reason, we are unable to assess whether there was a "strong causal connection" between the challenged *Terry* stop and defendant's subsequent inculpatory statements, as defendant contends. Such inquiry is fact-specific, and the record before us is simply insufficient for our review. See *People v. Dennis*, 373 Ill. App. 3d 30, 47 (2007) (noting that the "question of whether a statement has been obtained by the exploitation of a prior illegal police action must be answered based on all of the facts of each case, and no single factor is dispositive"); *People v. Watson*, 315 Ill. App. 3d 866, 881 (2000) (same).

¶ 31 For the foregoing reasons, we decline to consider the defendant's ineffective assistance claim in this appeal because "[t]he record is insufficient to support either party's argument." *Bew*, 228 Ill. 2d at 134.

¶ 32 CONCLUSION

¶ 33 For the reasons stated herein, defendant's conviction on Count 1 is vacated, and his conviction and sentence on Count 3 are affirmed.

¶ 34 Vacated in part; affirmed in part.