2016 IL App (1st) 143638-U

THIRD DIVISION
November 2, 2016

No. 1-14-3638

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 17406
	)	
BRIAN GARCIA,	)	The Honorable
	)	Lawrence Edward Flood,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to sustain defendant's conviction for unlawful use of a weapon by a felon, notwithstanding any irregularity in the charging instrument. Additionally, trial counsel was not ineffective for failing to file a meritless motion to suppress evidence. Furthermore, defendant's prior convictions for aggravated unlawful use of a weapon did not impact his sentence and, thus, he was not entitled to a new sentencing hearing.

¶ 2 Following a bench trial, defendant Brian Garcia was found guilty of unlawful use of a weapon by a felon (UUWF) and was sentenced to nine years in prison. On appeal, defendant asserts that (1) the evidence was insufficient to sustain his conviction; (2) the State failed to prove that he was previously convicted of UUWF, the predicate offense named in the present

UUWF charge; (3) trial counsel was ineffective for failing to file a motion to suppress the weapon recovered by the police; and (4) defendant is entitled to a new sentencing hearing because the trial court improperly relied on two prior convictions for aggravated unlawful use of a weapon (AUUW), an offense now found to be unconstitutional. For the following reasons, we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 On September 6, 2012, two police officers pulled over an SUV driven by defendant. The SUV had been traveling the wrong way on a one-way street. While defendant's two backseat passengers complied with the officers' commands to put their hands up, and the front seat passenger sat perfectly still, defendant interacted with the center console for between 40 and 60 seconds. The officers subsequently discovered that the center console had a secret compartment containing a firearm.

¶ 5 Defendant was charged with UUWF (720 ILCS 5/24-1.1(a) (West 2012)), originally predicated on his prior conviction for UUWF under case no. 09 CR 736801. The trial court subsequently granted the State's motion to amend the charge to reflect defendant's prior conviction under case no. 04 CR 28270. In that case, defendant was convicted of aggravated discharge of a firearm (720 ILCS 5/24-1.2 (West 2004)).

¶ 6 At trial, Officer Filiberto Rosas testified that at 11:30 p.m. on September 6, 2012, he and his partner, Officer Jean Lindgren, were in a marked car near the 5300 block of Christiana when Officer Rosas saw an SUV traveling the wrong way on 53rd Street. The officers activated their emergency lights and siren, and followed the SUV for several blocks in an attempt to curb it. At that time, Officer Rosas could not see whether the SUV's four occupants were moving their hands. Ultimately, the SUV stopped.

¶ 7 Officer Rosas approached the driver side of the SUV and Officer Lindgren approached the passenger side. When Officer Rosas ordered the SUV's occupants to raise their hands, defendant made "aggressive furtive movements" with his hands toward the back of the center console. That being said, Officer Rosas acknowledged he did not testify at the preliminary hearing that defendant made furtive movements. Additionally, Officer Rosas was pointing a flashlight into the SUV but did not see a gun in defendant's hand or see him open or close the console. More specifically, Officer Rosas could not see defendant's hands at all, as his body blocked the officer's view. Officer Lindgren, however, yelled for Officer Rosas to watch defendant because he was doing something.

¶ 8 Officer Rosas ordered defendant to show his hands, although the officer did not include this detail in his reports. Those reports did state that Officer Lindgren ordered defendant to stop moving his hands. Meanwhile, the rear passengers had complied with the command to raise their hands and the front seat passenger was completely still. In contrast, Officer Rosas ordered defendant to put his hands up six to eight times over a period of 40 to 60 seconds before he stopped moving in the center console area and complied. Officer Rosas testified that while the console was closest to the rear passengers, their hands were in the air and, thus, defendant's hands were closer to the console.

¶ 9 Upon inquiry, defendant said he did not have a driver's license. As a result, defendant was placed in custody. Defendant, who had identified himself as Eric Diaz, was handcuffed and placed in the squad car. After determining defendant's real name, the officers learned he had a suspended license. Pursuant to Chicago Police Department policy, officers would impound a car when a driver was operating a vehicle with a suspended license but the police would first relocate to the police station to get a driver's abstract and determine what a driver was suspended

for. Before driving the SUV to the station or turning it over to the other passengers, the officers needed to determine whether there was a dangerous object in the console.

¶ 10 Officer Rosas safely secured the vehicle to make sure it contained no weapons. He also looked in the center console area because he "wanted to investigate to see why [defendant] was making aggressive movements *** when he had his hands towards the rear of the console." Officer Rosas believed a dangerous object was there and pointed his flashlight where the console was ajar, apparently referring to the vent area on the top of the console and the side of the console. Upon seeing the butt of a gun and currency, he realized that the console had a hidden compartment. Officer Rosas, who had been trained regarding hidden compartments, did not open the SUV's compartment because such compartments were usually "booby trapped." At the police station, Officer Thorton opened the compartment and recovered a loaded semi-automatic handgun and $6,185.

¶ 11 Officer Lindgren substantially corroborated Officer Rosas' testimony. She testified that when she and Officer Rosas approached the car, she flashed a light inside the vehicle and saw the driver "making these aggressive movements towards his back like he's trying to put something or take something from the side of the console with his back towards my partner." That being said, she could not see exactly what defendant's hands were doing. The SUV was large and she was not physically able to see him open or close the console. As Officer Lindgren proceeded toward the front of the SUV, she saw through the windshield that "he's got his hands in between the console and he's bent over, hunched over moving." Specifically, defendant was turned to his side and "was either down in - - in [the console] or behind it with his hands." Officer Lindgren also testified that defendant "was hunched over toward his right bent forward with his hands back and below the console area." Based on her experience, she believed he was attempting to hide a

weapon, although she never saw one in his hands. Furthermore, defendant failed to comply with both officers' commands. "After multiple requests[,] he very slowly put his hands [up] *** and then sat straight up."

¶ 12 After Officer Rosas placed defendant in custody, other officers came and removed each passenger from the SUV. The three individuals were free to leave after name checks revealed no issues. Officer Lindgren placed defendant in the back seat of the squad car and obtained defendant's identity by entering his tattoos into her computer system. She also learned that defendant's license was suspended.

¶ 13 A certified copy of conviction for aggravated discharge of a firearm in case no. 04 CR 28270 was admitted into evidence and the State rested. In the defense's case, the parties stipulated that Isela Lopez of Oak Lawn owned the SUV. The defense then rested. The court subsequently found defendant guilty of UUWF. In light of defendant's movements toward the console, his failure to comply with the officers' commands and the false name he gave the police, the court found defendant possessed the weapon, notwithstanding that the officers did not see the weapon in his hands. The trial court subsequently denied defendant's post-trial motions and sentenced defendant to nine years in prison.

¶ 14 II. ANALYSIS

¶ 15 A. Sufficiency of the Evidence

¶ 16 On appeal, defendant first asserts the evidence was insufficient to sustain his UUWF conviction because he did not possess the weapon found in the SUV. When a defendant challenges the sufficiency of the evidence, a reviewing court must determine 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 to have been proven beyond a reasonable

doubt. *People v. Bradford*, 2016 IL 118674, ¶ 12. Additionally, the trial court is entitled to assess the witnesses' credibility, resolve conflicts in the evidence and draw reasonable inferences therefrom. *Id*. Thus, we may not substitute the trial court's factual findings regarding the weight of the evidence or the credibility of the witnesses with our own. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). Furthermore, this standard applies to both direct and circumstantial evidence. *Id*. at 281. In applying this standard, reviewing courts must permit all reasonable inferences in favor of the State. *People v. Cardamone*, 232 Ill. 2d 504, 511 (2009). The trial court is not required to ignore inferences which flow from the evidence or to look for possible explanations consistent with the defendant's innocence. *Jackson*, 232 Ill. 2d at 281.

¶ 17 Section 24-1.1(a) of the Criminal Code of 2012 states as follows:

> "It is unlawful for a person to knowingly possess on or about his person or on his land or in his own abode or fixed place of business any weapon prohibited under Section 24-1 of this Act or any firearm or any firearm ammunition if the person has been convicted of a felony under the laws of this State or any other jurisdiction." 720 ILCS 5/24-1.1(a) (West 2012).

As a result, the State was required to prove that defendant possessed a firearm and had a prior felony conviction. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003). That being said, proof of constructive possession, rather than actual possession, is sufficient and constructive possession is frequently proven through circumstantial evidence. *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 23.

¶ 18 To demonstrate constructive possession, the State must prove that the defendant knew of the contraband and exercised immediate, exclusive control over the area where the contraband was found. *People v. Sams*, 2013 IL App (1st) 121431, ¶ 10. In assessing constructive

possession, the trial court is entitled to make reasonable inferences of knowledge and possession if no other factor creates a reasonable doubt of the defendant's guilt. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. Knowledge can be inferred from, among other things, the defendant's movements suggesting an effort to conceal the weapon. *People v. Ingram*, 389 Ill. App. 3d 897, 900 (2009). Additionally, control is established when a person has both the capability and the intent to maintain control and dominion over an item, even if he does not have personal present dominion over it. *Spencer*, 2012 IL App (1st) 102094, ¶ 17.

¶ 19 Moreover, constructive possession can be established even where others have access to the location where contraband is found (*Maldonado*, 2015 IL App (1st) 131874, ¶ 43), and other individuals' access to contraband merely suggests joint possession (*Ingram*, 389 Ill. App. 3d at 901). Otherwise, a defendant could escape criminal liability by simply inviting others to participate in his criminal enterprise. *Id*. This court has also found that constructive possession is not negated by evidence that the defendant did not own the car where contraband was found. See *People v. Love*, 404 Ill. App. 3d 784, 790 (2010).

¶ 20 Here, the evidence was sufficient for the trial court to find defendant constructively possessed the weapon. First, defendant was driving the car, suggesting that he had some control over the car and the contents in it, notwithstanding that he did not own the car. *Cf. People v. Tates*, 2016 IL App (1st) 140619, ¶¶ 20, 24 (finding evidence was insufficient to find the defendant possessed contraband where there was no evidence that he exercised control over the home where the contraband was found and no circumstantial evidence showed he controlled the contraband itself). Additionally, defendant continued driving the SUV after the officers activated their emergency equipment. See *People v. Ingram*, 389 Ill. App. 3d 897, 901 (2009) (considering testimony that the defendant ignored the police officer's command to stop running). Although

defendant suggests he had to find an appropriate place to curb the SUV in order to comply with traffic laws, no evidence specifically showed that he stopped the SUV at the first opportunity. According to Officer Rosas, even when defendant finally stopped the vehicle, he parked in the street, not in a parking space, suggesting that obedience to traffic laws was not his paramount concern.

¶ 21 Assuming that defendant's conduct did not constitute flight from the police, both officers testified that defendant ignored commands to raise his hands or stop moving them. Instead, he interacted with the center console for 40 to 60 seconds. *Cf. Sams*, 2013 IL App (1st) 121431, ¶ 13 (observing that mere presence near contraband is insufficient to demonstrate constructive possession). This supports a reasonable inference that defendant believed it was more important to attend to something in that area than to obey law enforcement. Although defendant challenges Officer Rosas' characterization of defendant's movements as furtive, the trial court was entitled to infer that defendant was attempting to secretly store the firearm in the compartment, notwithstanding that he was unsuccessful. This inference is particularly reasonable given that aside from the compartment's contents, nothing else worth noting was in that area. See *People v. Grant*, 339 Ill. App. 3d 792, 798-99 (2003) (finding the evidence sufficient where the officer could not see the defendant's hands but nonetheless saw him put something on the seat where the weapon was subsequently found). Accordingly, the trial court was entitled to find that defendant's conduct showed he knew there was a weapon in the SUV and that he was exercising control over the weapon by attempting to conceal it in that compartment. *Cf. People v. Ortiz*, 196 Ill. 2d 236, 259 (2001) (where contraband was found in a secret compartment of a semi-truck's trailer, and apparently no one saw the defendant, who was hired to drive the truck, in the area of the compartment, the supreme court declined to presume he knew of the contraband).

¶ 22 Moreover, defendant's decision to provide a false name supports the trial court's finding that he constructively possessed the weapon. See *Love*, 404 Ill. App. 3d at 790. Defendant argues that he could have given the police a false name because he was driving on a suspended license. The court was not required to find that that was the case, however. *People v. Coleman*, 158 Ill. 2d 319, 339 (1994) (observing that the use of a false name is relevant to consciousness of guilt).

¶ 23 Defendant nonetheless argues that the firearm could have belonged to his passengers, particularly those in the backseat. In doing so, defendant ignores that those passengers had their hands in the air or remained perfectly still while he continued moving in the area of the console. Thus, they did not have access equal to that of defendant at the time when the officers curbed the SUV. See *People v. Cogwell*, 8 Ill. App. 3d 15, 17 (1972) (observing that while equal access of others to the contraband can defeat constructive possession, the presence of others does not automatically negate constructive possession). Even if those passengers did have equal access to the weapon, defendant would still be deemed to have jointly possessed it based on a reasonable inference that he both knew of and attempted to exercise control over the weapon. The lack of physical evidence specifically connecting defendant to the weapon does not change the result. See *People v. Faulkner*, 2015 IL App (1st) 132884, ¶ 29.

¶ 24 Given that defendant alone ignored repeated commands from police officers, spent a significant amount of time gesturing toward the area where the firearm was found, and subsequently gave a false name, the evidence was sufficient for the trial court to find defendant constructively possessed the firearm.

¶ 25 B. The Charging Instrument

¶ 26 Next, defendant asserts that the evidence was insufficient to sustain his present conviction for UUWF because it failed to prove that he had a prior conviction for UUWF, as

alleged in both the original and amended information. To resolve this issue, we first recite the circumstances leading to the amended information.

¶ 27 i. The Amendment

¶ 28 At trial, the State sought leave to amend the prior conviction reflected in the UUWF charge: "The felony conviction that the defendant has was the wrong one under the prelim transcript. I'd be asking to admit - - amend it to 04 CR 28270," defendant's prior conviction for aggravated discharge of a firearm. Defense counsel objected, arguing that the information had specifically identified a different case number. In reply, the State argued that it tendered to defense counsel before trial defendant's rap sheet listing his prior felony convictions. The State added, "[i]t's just a different case number. It shouldn't come to [*sic*] a surprise to counsel that the Defendant is convicted of a felony."

¶ 29 The trial court found the information notified defendant that the State would seek a Class 2 sentence and no one disputed that defendant had in fact been convicted under case no. 04 CR 28270. As a result, the trial court granted the State's motion and admitted into evidence a certified copy of defendant's aggravated discharge of a firearm conviction under case no. 04 CR 28270. Thus, it appears that the State intended to use the prior aggravated discharge of a firearm conviction to satisfy both the prior felony element of the UUWF offense, as well as the prior felony required to enhance his sentence. The amended charge found in our record, however, does not reflect that intention. Instead, it states as follows:

> "He, knowingly possessed on or about his person any weapon prohibited by section 24-1 of this code, to wit: firearm, after having been previously convicted of the felony offense of unlawful possession of a weapon by a felon, under case number 09CR0736801, under the laws of the state of Illinois,

In violation of chapter 720 Act 5 Section 24-1.1(a) of the Illinois Compiled Statutes 1992 as amended and

The State shall seek to sentence him as a class 2 offender, in that he has been previously convicted of violation 24-1.1 under case number ~~09CR0736801~~ 04 CR 282270."

Contrary to the trial court's oral pronouncement granting the State's motion, this charge, which was amended by hand, still referred to defendant's prior UUWF conviction in case no. 09 CR 0736801 as the conviction creating defendant's felony status. Additionally, the charge failed to reflect that the prior offense in case no. 04 CR 28270 was for aggravated discharge of a firearm, rather than UUWF, and the 2004 case number included an extra digit.

¶ 30 ii. UUWF Requires a Felon, Not a Particular Felony

¶ 31 As stated, the UUWF statute requires that a defendant has "been convicted of a felony." 720 ILCS 5/24-1.1(a) (West 2012). Our supreme court recently reaffirmed that the statute requires the State to prove only that the defendant was a felon, not that the defendant's prior conviction was for any specific felony. *People v. McFadden*, 2016 IL 117424, ¶¶ 14, 27. "[B]ecause the only purpose for admitting a defendant's prior-conviction record is to establish felon status, the name and nature of the prior convictions [are] unnecessary surplusage without any evidentiary significance." *People v. Walker*, 211 Ill. 2d 317, 338 (2004). Contrary to defendant's assertion, our supreme court's decision in *People v. Easley*, 2014 IL 115581, does not suggest otherwise.

¶ 32 In *Easley*, the supreme court addressed whether the State was required to notify the defendant of its intent to seek an enhanced sentence as contemplated in section 111-3(c) of the

Code of Criminal Procedure of 1963 (725 ILCS 5/111-3(c) (West 2008)). The defendant, like defendant here, had been sentenced for UUWF as a Class 2 offender under section 24-1.1(e):

> "Violation of this Section *** shall be a Class 3 felony for which the person shall be sentenced to no less than 2 years and no more than 10 years and *any second or subsequent violation shall be a Class 2 felony for which the person shall be sentenced to a term of imprisonment of not less than 3 years and not more than 14 years.* Violation of this Section by a person *** who has been convicted of a forcible felony, [or] a felony violation of Article 24 of this Code *** is a Class 2 felony for which the person shall be sentenced to not less than 3 years and not more than 14 years." 720 ILCS 5/24-1.1(e) (West 2008); 720 ILCS 5/24-1.1(e) (West 2012).

Because the specific indictment in that case cited the defendant's prior UUWF conviction as the felony establishing his felony status, the State was not required to notify the defendant pursuant to section 111-3(c) that the State intended to seek an enhanced sentence; rather, by citing that prior conviction, it was clear that the defendant could only be sentenced as a Class 2 offender. *Easley*, 2014 IL 115581, ¶ 22. While the court stated that the defendant's prior UUWF conviction "was already included as an element of the charged offense," the issue was whether the charges properly notified the defendant of the offense in that case, not whether the evidence was sufficient to sustain his conviction. *Id.* ¶¶ 13, 26. Thus, *Easley* did not hold that the State is required to prove a defendant's prior conviction was for a specific felony in order for the evidence to be sufficient. Even if *Easley* had done so, the more recent decision in *McFadden* would negate that holding.

¶ 33 iii. Variance Between Information and Evidence

¶ 34 Notwithstanding defendant's characterization of his contention, his argument more accurately pertains to the adequacy of the information. See *People v. Cohn*, 2014 IL App (3d) 120910, ¶ 13 (finding the defendant had mischaracterized an issue pertaining to the information as a sufficiency of the evidence matter); *People v. Roe*, 2015 IL App (5th) 130410, ¶¶ 6, 8 (finding the defendant's contention that due process was violated due to his conviction for a charge not made was an argument regarding a variance between the charging instrument and the evidence presented, rather than a challenge to the sufficiency of the evidence).

¶ 35 Due process requires an indictment to inform the defendant of the precise offense charged. *People v. Roe*, 2015 IL App (5th) 130410, ¶ 9. Additionally, a fatal variance between the proof leading to the defendant's conviction and the charging instrument requires reversal. *Id.* ¶¶ 6, 8. To be fatal, however, a variance must be material and mislead the accused with respect to his defense or expose the defendant to double jeopardy. *People v. Arndt*, 351 Ill. App. 3d 505, 518 (2004).

¶ 36 Here, the transcript hearing indicates that the State, defense counsel and the trial court understood that all of the information's references to the UUWF conviction under case no. 09 CR 0736801 would be replaced with defendant's conviction for aggravated discharge of a firearm under case no. 04 CR 28270, notwithstanding that the written charge did not fully reflect that understanding. See *People v. Psichalinos*, 229 Ill. App. 3d 1058, 1060 (1992) (observing that the State orally amended the charge). Thus, we question whether any variance existed between the charge as orally amended and the proof admitted at trial, *i.e.*, the certified copy of defendant's 2004 conviction.

¶ 37 In any event, the variance between the written charge and such proof was not fatal. First, the variance was not material. As stated, UUWF is based on defendant's felon status, not the

specific offense committed. Defendant was not mislead with respect to his defense or prejudiced in any other way. Following the court's oral ruling, defendant was well aware of the State's intention to use the 2004 conviction. Additionally, defendant does not dispute that he was convicted of aggravated discharge of a firearm in 2004.

¶ 38 We further observe that the trial court was required to impose a Class 2 sentence regardless of whether the State used the prior 2009 UUWF conviction or the 2004 aggravated discharge of a firearm conviction as the predicate offense. In the former instance, section 24-1.1(e) required a Class 2 sentence because this would be defendant's second UUWF conviction. In the latter instance, section 24-1.1(e) required a Class 2 sentence because aggravated discharge of a firearm constitutes a forcible felony (*People v. Figueroa*, 381 Ill. App. 3d 828, 835 (2008)), and because that felony is found in Article 24 (720 ILCS 5/24-1.2 (West 2004)). Moreover, defendant has not been exposed to possible double jeopardy. If the State attempted to further prosecute defendant, the record in this case would reveal that defendant had already been prosecuted based on the same facts. See *Arndt*, 351 Ill. App. 3d at 518-19. Accordingly, we reject defendant's assertion that his conviction must be vacated.

¶ 39 C. Ineffective Assistance of Counsel

¶ 40 Defendant further asserts that trial counsel was ineffective for failing to file a motion to suppress evidence of the firearm. Defendant contends that such motion would have been successful. In response, the State argues that the automobile exception to the warrant requirement applies because the officers lawfully stopped the SUV and the police had probable cause to believe it contained contraband.

¶ 41 To demonstrate that counsel was ineffective, a defendant must show that counsel's performance was unreasonable and that a reasonable probability exists that the result of the

proceeding would have been different in the absence of counsel's errors. *People v. Cherry*, 2016 IL 118728, ¶ 24. The failure to establish either prong will defeat an ineffective assistance of counsel claim. *People v. Fellers*, 2016 IL App (4th) 140486, ¶ 23. Where such claim pertains to counsel's alleged failure to file a motion to suppress, a defendant must show that the unargued motion was meritorious and that a reasonable probability exists that the outcome of trial would have been different if the evidence had been suppressed. *People v. Henderson*, 2013 IL 114040, ¶ 15. Consequently, the failure to file a motion to suppress does not constitute incompetent representation where the motion would have been futile. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). Furthermore, where a defendant's claim of ineffective assistance is based on counsel's failure to move to suppress evidence, the record will frequently be inadequate to assess that claim because the record was not created for that purpose. *Henderson*, 2013 IL 114040, ¶ 22; *People v. Evans*, 2015 IL App (1st) 130991, ¶ 34 (declining to address the defendant's ineffective assistance of counsel claim where the record was devoid of evidence necessary to review that claim).

¶ 42 A search conducted without the prior approval of a magistrate is *per se* unreasonable under the fourth amendment, absent an applicable exception. *People v. Bridgewater*, 235 Ill. 2d 85, 93 (2009). Pursuant to the automobile exception, officers may perform a warrantless search of an automobile if they lawfully stop the vehicle and have probable cause to believe it contains evidence of criminal activity or contraband, which the officers can seize. *People v. Parker*, 354 Ill. App. 3d 40, 45 (2004). The automobile exception is based on the reality that automobiles may be driven away, rendering it impossible for officers to obtain a search warrant. *People v. Contreras*, 2014 IL App (1st) 131889, ¶ 28. When an officer possesses probable cause, he may

search the automobile and any interior compartments that could reasonably contain the contraband. *Id*.

¶ 43 Probable cause is a fluid construct dependent upon assessing probabilities in a given factual context. *Id*. ¶ 29. A police officer has probable cause where the totality of facts and circumstances known to him at the time of the vehicle search, in light of his experience, would cause a reasonably prudent person to believe evidence of a crime was in the vehicle. *Parker*, 354 Ill. App. 3d at 45. Similarly, a police officer is entitled to rely on his experience and training to draw inferences that might elude an untrained individual. *People v. Jones*, 215 Ill. 2d 261, 274 (2009). In addition, furtive movements can justify a warrantless search if accompanied by circumstances tending to demonstrate probable cause. *People v. Creagh*, 214 Ill. App. 3d 744, 747 (1991). Probable cause does not require the State to demonstrate that the officer's belief that the defendant was committing a crime was correct, or even more likely correct than not. *Jones*, 215 Ill. 2d at 277.

¶ 44 Even assuming the record contains all evidence relevant to this matter, the trial court would not have suppressed evidence of the weapon recovered from the SUV because the automobile exception to the warrant requirement applies here. Defendant does not dispute that the officers lawfully stopped the SUV he was driving after he committed a traffic infraction. In addition, no evidence suggests that the officers were investigating a traffic violation as subterfuge to obtain other evidence. See *People v. Penny*, 188 Ill. App. 3d 499, 502 (1989). Furthermore, the officers had probable cause to believe that defendant possessed contraband in the SUV.

¶ 45 Officer Rosas testified that for 40 to 60 seconds, defendant disregarded their orders for him to show his hands. Instead, he moved around in the console area. Officer Rosas believed that

a dangerous object was there. Similarly, Officer Lindgren testified that based on her experience, she believed defendant was attempting to hide a weapon. While defendant argues a driver might reach into a console to find insurance or registration information, an innocent driver would not continue to do so if a police officer repeatedly ordered him to show his hands. *Cf. Creagh*, 214 Ill. App. 3d at 746, 748 (testimony that the defendant lifted his body off the car seat as if putting something in his pants, was insufficient to justify a search because his action was consistent with innocent conduct); *People v. Trisby*, 2013 IL App (1st) 122552, ¶ 17 (finding that a few furtive movements toward a pants pocket and one hand-to-hand transaction involving an unidentified object were insufficient to show probable cause). Defendant's prolonged conduct negated any potentially innocent explanation.

¶ 46 Moreover, Officer Rosas described defendant's movements as aggressive and furtive. We once again reject defendant's challenge to this characterization. At best, defendant was unsuccessful in his efforts to hide the contraband. Additionally, defendant may have overestimated the covertness of the console's compartment or the tinted windows' impact on the officers' ability to see inside the SUV. Furthermore, defendant used an alias. The evidence reflected more than mere curiosity or suspicion on the officers' part. See *Penny*, 188 Ill. App. 3d at 502 (finding that mere curiosity or suspicion alone does not justify a search).

¶ 47 Defendant also argues that the State failed to demonstrate that his movements were consistent with accessing the secret compartment because the police ultimately removed the console's climate control panel at the police station in order to access the compartment. Probable cause, however, is considered in light of facts known to the officer at the time of the search (*People v. Byrd*, 408 Ill. App. 3d 71, 91 (2011)), not facts later learned at the police station.

Additionally, the record is silent as to whether Officer Thorton accessed the secret compartment in that fashion as a matter of necessity or whether he did so to avoid any booby traps.

¶ 48 Here, the officers lawfully stopped the SUV. Additionally, a reasonable person would believe that defendant was trying to secret away contraband where (1) for an extended period of time, he repeatedly disobeyed orders to show his hands; (2) he continuously made movements in the console area; and (3) he subsequently provided police officers with a false identity. Thus, the automobile exception to the warrant requirement applies. In light of our determination, we need not consider the parties' arguments with respect to other exceptions. *Cf. People v. Estrada*, 394 Ill. App. 3d 611, 619-21 (2009) (after finding the initial stop was improper, the reviewing court added in *dicta* that the search incident to arrest doctrine did not apply). Because defendant has not shown that a motion to suppress evidence would have succeeded, trial counsel was not ineffective for failing to file one.

¶ 49 D. Sentencing

¶ 50 Finally, defendant asserts that at sentencing, the trial court improperly considered his prior AUUW convictions (case nos. 02CR0641601 & 02CR0934101) as aggravating factors because our supreme court held in *People v. Aguilar*, 2013 IL 112116, ¶ 22, and *People v. Burns*, 2015 IL 117387, ¶ 20, that the specific AUUW statute on which those convictions are based (720 ILCS 24-1.6(a)(1), (a)(3)(A) (West 2002)) is unconstitutional. The State does not dispute that the prior AUUW convictions were unconstitutional but, instead, responds that defendant cannot show the prior convictions affected his sentence given his lengthy criminal record.

¶ 51 The parties dispute the appropriate standard of review to be applied. While defendant contends that the issue of whether the trial court considered improper sentencing factors should be reviewed *de novo*, the State maintains that we must review sentencing proceedings for an

abuse of discretion. Case law supports both positions. Compare *People v. Mauricio*, 2014 IL App (2d) 121340, ¶ 15, with *People v. Cotton*, 393 Ill. App. 3d 237, 265 (2009). Under either standard, we would find that defendant is not entitled to resentencing. A reviewing court can affirm a sentence despite an improper aggravating factor where the record shows that the weight placed on that factor was so insignificant that it did not result in a greater sentence. *People v. Heider*, 231 Ill. 2d 1, 21 (2008).

¶ 52 Our supreme court's recent decision in *McFadden* guides our assessment of defendant's contention. There, the defendant argued that had the trial court been aware at sentencing that his AUUW conviction was unconstitutional, the trial court, with fewer prior convictions before it, would have imposed a lesser sentence. *McFadden*, 2016 IL 117424, ¶ 40. Our supreme court found, however, that the trial court did not place significant weight on the defendant's prior AUUW conviction or an additional prior UUWF conviction, which had had been vacated under the one-act, one-crime doctrine. *Id*. ¶ 41. Additionally, the court observed that "the trial court did not point to any one prior conviction but, rather, referenced generally his 'criminal history' as a factor in sentencing." *Id*. ¶ 44. Furthermore, the presentence investigative report (PSI) showed defendant was a gang member. *Id*. After describing the threatening nature of the defendant's present armed robbery offenses, the court observed that the defendant's sentence was 16 years below the maximum permissible. *Id*. ¶¶ 45-46. Thus, defendant was not entitled to resentencing. *Id*. ¶ 46.

¶ 53 We find the same result is required here. Defendant's criminal background was extensive, even without the prior AUUW convictions. The PSI showed juvenile dispositions for mob action, criminal damage to property, burglary, possession of a stolen vehicle, criminal trespass to a vehicle, aggravated battery, UUWF and violations of probation. In addition to the two

challenged AUUW convictions, as well as the aforementioned adult convictions for aggravated discharge of a firearm and UUWF, defendant had misdemeanor infractions for reckless conduct, drinking on a public way as a minor and street gang contact. Although defendant stated during the preparation of the PSI that he was a member of the Latin Kings only until 2006, his 2008 conviction for street gang contact suggests otherwise. In aggravation, Officer Matthew Lopez testified that on November 7, 2004, defendant fired multiple gunshots out of a car window at two pedestrians. When Officer Lopez activated his emergency equipment, defendant accelerated and eventually crashed into parked cars.

¶ 54 The trial court trial stated it was troubled that defendant had made bad choices, choosing gang life and guns, when he had also demonstrated the ability to earn income and be a productive member of society. Specifically, the court observed that defendant had a GED and a welding certificate. We also note the PSI shows that for a short time, defendant worked at Home Depot. "I have to deal with the fact that you're in front of me convicted of this offense. And you're in front of me convicted of the offense with the background you have." Although the State requested a sentence in the upper range, the court sentenced defendant to nine years in prison, five years less than the maximum. See 720 ILCS 5/24-1.1(e) (West 2012) (requiring a Class 2 sentence of between 3 and 14 years in prison).

¶ 55 Like *McFadden*, the trial court was clearly concerned with defendant's gang membership and his extensive criminal background, not his specific AUUW convictions. At no point did the court specifically refer to those convictions. While the court did discuss defendant's use of guns, that factor was not unique to the AUUW convictions. Furthermore, it is equally likely that the trial court addressed defendant's use of guns in light of Officer Lopez's troubling testimony

regarding the 2004 case. Thus, the record shows that the trial court would have imposed a nine-year prison term even without the prior AUUW convictions.

¶ 56 III. CONCLUSION

¶ 57 Having considered the record and the parties' contentions in their entirety, we find the evidence was sufficient to sustain defendant's conviction for UUWF, trial counsel was not ineffective for failing to file a motion to suppress and defendant is not entitled to a new sentencing hearing. Accordingly, we affirm the trial court's judgment in its entirety.

¶ 58 Affirmed.