20116 IL App (1st) 160397-U

No. 1-16-0397

Fourth Division
July 14, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

In re Tavon B., a Minor	)	Appeal from the
	)	Circuit Court of
(THE PEOPLE OF THE STATE OF ILLINOIS,	)	Cook County.
	)	
	)	No. 15 JD 3872
Petitioner-Appellee,	)	
	)	Honorable
v.	)	Cynthia Ramirez,
	)	Judge, presiding.
Tavon B.,	)	
	)	
Respondent-Appellant).	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: Respondent's commitment to Department of Juvenile Justice must be vacated and the case remanded for resentencing where trial court did not make a finding that commitment was the least restrictive alternative.

¶ 2 Respondent Tavon B., a 17-year-old, was charged with two counts of aggravated unlawful use of a weapon (AUUW) and one count of unlawful possession of a firearm. Following a bench trial in juvenile court, respondent was adjudicated delinquent on all three

counts and the trial court sentenced respondent to commitment to the Department of Juvenile Justice until he attained 21 years of age. On appeal, respondent contends that the testimony of the State's only witness was insufficient to support his adjudications beyond a reasonable doubt. He also contends that the trial court made multiple sentencing errors, including: (1) failing to make a finding that commitment was the least restrictive alternative, (2) failing to consider all of the necessary statutory factors, and (3) sentencing respondent to a term in excess of the statutory maximum. We affirm respondent's adjudications of delinquency, but remand for resentencing.

¶ 3 BACKGROUND

¶ 4 At trial, Chicago police officer Ortiz testified that he and two partners were on patrol in an unmarked squad car on December 10, 2015. During that patrol, Ortiz witnessed four to five males "loiter[ing]" near a grocery store. Ortiz decided to conduct a field interview. As Ortiz and his partners exited the car, respondent looked towards the officers before running inside the store. From ten feet away, Ortiz "observed [respondent] grabbing his right side which revealed *** the handle of a handgun." Ortiz and one of his partners pursued respondent into the store, where they found him standing in the checkout line. When Ortiz approached him, respondent moved into one of the aisles. Following him, Ortiz "observed him dropping an item behind a coffee tin." Ortiz testified that he thought the tin "was a Coffee-mate tin product." The officer then detained respondent and within seconds found a five-to-six-inch-long, .22-caliber revolver behind the coffee tin. When asked at trial, Ortiz could not remember what the handgun's handle looked like. After finding the weapon, Ortiz asked if respondent had a Firearm Owner's Identification (FOID) card and respondent replied that he did not have one and that he was a minor. Respondent later told Ortiz that he was 17

years old. On cross-examination, Ortiz could not specify the size of the recovered handgun's handle in relation to its barrel. He also noted that the grocery store had a video surveillance system. Although he attempted to obtain video of the incident, he was told that "there was no video for it." He further testified that it was standard practice to automatically send recovered firearms for fingerprint analysis.

¶ 5 Respondent testified that he was entering a grocery store on December 10, 2015, when a nearby police car made a U-turn and drove towards the store. A nearby group of six males of about his age fled the area. Respondent continued into the store and got into line to buy something. Officer Ortiz followed respondent into the store and then "went into an aisle, he grabbed a gun, and he put it in his hand, and he grabbed [respondent] and took [him] outside." Outside, Ortiz ran respondent's name and asked who the individuals who fled were. The State did not cross-examine respondent.

¶ 6 The trial court adjudicated respondent delinquent on all counts, explicitly noting that it found Ortiz's testimony to be credible.

¶ 7 At the sentencing hearing, the State argued that respondent should be committed to the Department of Juvenile Justice. It noted that at the time of his arrest in the present case, he was serving probation for a prior firearm-related offense and that he also had another prior adjudication before the court. Respondent's counsel requested that he be allowed to relocate to Iowa to live with his cousin based upon the social investigation report. A probation officer also recommended relocation to Iowa.

¶ 8 In its oral findings, the trial court stated:

"All right. I've had an opportunity to review the supplemental social. I appreciate that in some respects [respondent] followed his probation order, but in the most

> significant way he did not and that's in picking up another gun charge. If this was a circumstance where he was standing before the Court on a technical violation perhaps the Court would be inclined to consider affording him a recommitment, but that is not the case.
>
> We're talking about a minor who is now before the court on a second gun charge. And [respondent's counsel] is absolutely correct, I cannot condone that.
>
> And telling me that you're in fear of your safety is not sufficient. It's illegal for you to have a gun first and foremost. I again repeated that to you when you were placed on probation. I also made it very clear to you that if you came before this Court on a second gun charge what the consequences would be.
>
> And as such I find that reasonable efforts have been made to prevent or eliminate the need for the minor to be removed from the home. Those efforts have been unsuccessful and that it is in the best interest of the minor and the community – the public that the minor be sentenced to the Department of Juvenile Justice."

The trial court also filed a written order of commitment on a form-order sentencing respondent to commitment to the Department of Juvenile Justice until he attained 21 years of age. The form-order contains the following relevant pre-printed findings with a box next to each: (1) "reasonable efforts have been made to prevent or eliminate the need for the minor to be removed from the home" and (2) "reasonable efforts were made to locate less restrictive alternatives to secure confinement and were unsuccessful." While the former statement's box is marked with an "x", the latter statement is unmarked. Respondent appeals.

¶ 9 ANALYSIS

¶ 10 Sufficiency of the Evidence

¶ 11 Respondent first contends that the State failed to prove him delinquent of AUUW and unlawful possession of a firearm beyond a reasonable doubt. He argues that Ortiz's testimony was so lacking in detail that a fact-finder could not rationally find Ortiz credible. He also argues that the officer's testimony was uncorroborated by any physical evidence or additional witness testimony and thus was insufficient to support the adjudication of delinquency, particularly where it was contradicted by respondent's own testimony. The State responds that Ortiz's testimony was sufficient to support the adjudication of delinquency on all counts and that the trial court's credibility determinations are entitled to great deference.

¶ 12 A challenge to the sufficiency of evidence supporting an adjudication of delinquency is governed by the same constitutional standards as a similar challenge to a criminal conviction. See *In re Malcolm H.*, 373 Ill. App. 3d 891, 893 (2007) ("The constitutional safeguard of proof beyond a reasonable doubt applies during the adjudicatory stage of juvenile delinquency proceedings.") (citing *In re Winship*, 397 U.S. 358, 368 (1970)). We therefore 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 beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); See also *In re W.C.*, 167 Ill. 2d 307, 336 (1995).

¶ 13 The positive and credible testimony of a single witness is sufficient to support a criminal conviction. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). A reviewing court must give due consideration to the fact that a trier of fact is able to see and hear the witnesses. See *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001). It is for the trier of fact to resolve any inconsistencies or contradictions in the testimony of the witnesses. *People v. Bull*, 185 Ill. 2d 179, 205 (1998). Where a conviction depends on eyewitness testimony, the reviewing court may find

testimony insufficient "only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt." *People v. Cunningham*, 212 Ill. 2d 274, 279 (2004).

¶ 14 An individual commits AUUW when he or she knowingly carries on or about his or her person any firearm when not on his or her land or in his or her abode, dwelling, or fixed place of business and one of several factors is present. 720 ILCS 5/24-1.6(a) (West 2014). Respondent was charged with two separate counts of AUUW: the first predicated on his lack of a valid FOID card (720 ILCS 5/24-1.6(a)(3)(C) (West 2014)) and the second predicated on the fact that he was younger than 21 years old (720 ILCS 5/24-1.6(a)(3)(I) (West 2014)). An individual commits unlawful possession of a firearm as charged when he or she is under 18 years of age and has in his or her possession any firearm of a size which may be concealed upon the person. 720 ILCS 5/24-3.1(a)(1) (West 2014).

¶ 15 Taking Ortiz's testimony in the light most favorable to the prosecution, a rational fact-finder could reasonably find respondent to be delinquent on all three counts. The officer observed the handle of a firearm protruding from respondent's waistband as he fled into a grocery store, clearly establishing possession of a firearm in a public place. This initial observation was corroborated shortly thereafter when Ortiz saw respondent attempt to hide an object behind a coffee tin and the officer subsequently found a five to six inch, .22-caliber handgun in that location. Respondent's flight and attempt to hide the firearm are circumstantial evidence of his consciousness of guilt. See *People v. Hart*, 214 Ill. 2d 490, 519 (2005). Furthermore, respondent's age and lack of a FOID card were evidenced by his responses to Ortiz's questions. Given this testimony, a rational fact-finder could reasonably find each element of the offenses beyond a reasonable doubt.

¶ 16 Respondent argues that Ortiz's testimony is inherently unreliable primarily because the officer could not offer a sufficiently detailed description of the firearm. We disagree. Ortiz remembered the gun's type, caliber, and size. The only details he could not recall were what the handle of the weapon looked like and the handle's size in relation to the barrel. Similarly, we are unpersuaded by respondent's argument that Ortiz's use of the phrase "I believe" in his testimony indicates that the officer could not sufficiently recall the events in question. Moreover, the trial court explicitly found Ortiz to be credible. The resolution of inconsistencies or contradictions in witness testimony is a matter for the trier of fact. *Bull*, 185 Ill. 2d at 205. The minor inconsistencies and missing details cited by respondent do not render the trial court's acceptance of the testimony unreasonable.[1] See *Cunningham*, 212 Ill. 2d at 279.

¶ 17 Respondent's argument that Ortiz's testimony was not corroborated by physical evidence is also unavailing. The State is not required to produce physical evidence. *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23.

¶ 18 Respondent also analogizes his case to *In re Nasie M.*, 2015 IL App (1st) 151678. In that case, the respondent was adjudicated delinquent on numerous firearm charges after being taken to a hospital with multiple gunshot wounds to his foot. *Id.* ¶ 5. The State's theory of the case rested on a police officer's testimony that the respondent had admitted accidentally shooting himself. *Id.* ¶¶ 1, 7. On appeal, this court ruled that the State had failed to prove beyond a reasonable doubt that the respondent possessed a firearm, relying on the fact that no witness had actually observed the respondent in possession of a firearm. *Id.* ¶ 37. In this case,

[1]Respondent also argues that the trial court must have accepted Ortiz's testimony as true based upon an improper belief that police officers are inherently more truthful than those charged with a crime. We note that there is absolutely nothing in the record that suggests an improper bias held by the trial court and thus we discuss this contention no further. See Ill. S. Ct. R. 341(e)(7) (eff. Jan 1, 2016) (requiring an appellant to support contentions with citations to the record); see also Ill. S. Ct. R. 612(i) (eff. Feb. 6, 2013) (applying Rule 341 to criminal appeals).

Officer Ortiz testified that he observed respondent with a firearm, and thus *In re Nasie M.* is clearly inapposite.

¶ 19 Sentencing

¶ 20 Respondent next contends that the trial court failed to make the mandatory finding that there was no less restrictive alternative to commitment, pursuant to subsection 5-750(1)(b) of the Juvenile Court Act (Act). 705 ILCS 405/ 5-750(1)(b) (West 2014). He acknowledges that he did not make a contemporaneous objection or include this issue in a post-sentencing motion, but argues that it is nonetheless reviewable under the second prong of plain error doctrine. The State argues that respondent has forfeited this issue and plain error is inapplicable because no error occurred. It argues that the trial court's statements show that it considered less restrictive alternatives, but considered them unsuitable given respondent's previous adjudications.

¶ 21 Generally, any sentencing issue not raised in a contemporaneous objection or in a post-sentencing motion is deemed forfeited on appeal. See *In re Raheem M.*, 2013 IL App (4th) 130585, ¶ 51. However, a forfeited issue may be reviewed under the plain error doctrine where a plain and obvious error has occurred and either "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The appellate court has previously held that a sentencing court's failure to make a mandatory finding under subsection 5-750(1)(b) of the act meets the second prong of plain error. *In re Raheem M.*, 2013 IL App (4th) 130585, ¶ 55.

¶ 22 Although a trial court has discretion in determining whether a commitment to the Department of Juvenile Justice is warranted, the question of whether it made a mandatory

finding is a question of law and is reviewed *de novo*. See *In re Henry P.*, 2014 IL App (1st) 130241, ¶ 53. Subsection 5-750(1) states, in relevant part:

> "[W]hen any delinquent has been adjudged a ward of the court under this Act, the court may commit him or her to the Department of Juvenile Justice, if it finds that *** (b) commitment to the Department of Juvenile Justice is the least restrictive alternative based on evidence that efforts were made to locate less restrictive alternatives to secure confinement and the reasons why efforts were unsuccessful in locating a less restrictive alternative to secure confinement." 705 ILCS 405/ 5-750(1) (West 2014).

¶ 23 Under the plain language of the subsection, a trial court may only sentence a respondent to commitment to the Department of Juvenile Justice after "first mak[ing] a finding that there are no less-restrictive alternatives to secure confinement available to defendant." *In re Henry P.*, 2014 IL App (1st) 130241, ¶ 57. The trial court must "actually and expressly" make such a finding. *In re H.L.*, 2016 IL App (2d) 140486-B, ¶ 54; see also *In re Henry P.*, 2014 IL App (1st) 130241, ¶ 57. The presence of evidence in the record supporting such a finding is insufficient where the trial court does not make an express finding. *In re H.L.*, 2016 IL App (2d) 140486-B, ¶ 54. In the absence of such a finding, an appellate court must remand the case to the trial court for resentencing in accordance with the provisions of subsection 5-750(1)(b). *Id.* ¶ 62.

¶ 24 The trial court in its oral pronouncement made no mention of whether commitment was the least restrictive alternative for respondent. Moreover, on the written order it did not mark the box indicating that it had made such a finding.[2] The State argues that the trial court's comments demonstrate that respondent had an earlier adjudication on a firearm offense four

[2]As the trial court did not mark the form-order's box regarding a least-restrictive-alternative finding, we do not address the State's contention that such a marking alone would be sufficient to meet subsection 5-750(1)(b)'s requirement.

months prior to the adjudication at issue and that the court had already warned respondent of the consequences of another offense. Thus, the State concludes, there was ample support in the record to show that less restrictive alternatives were not feasible. However, as this court has previously explained, "although the appellate record may support a determination that there were no less-restrictive alternatives available to defendant, the plain language of section 5-750(1)(b) states that the trial court must find that commitment is the least-restrictive alternative." *In re Henry P.*, 2014 IL App (1st) 130241, ¶ 60. The trial court made no such express finding, and thus, respondent's sentence must be vacated and his case remanded for resentencing.

¶ 25 The State also appears to argue that the trial court's oral and written findings "that reasonable efforts have been made to prevent or eliminate the need for the minor to be removed from the home" are sufficient to satisfy subsection 5-750(1)(b). However, this finding directly corresponds to the language of subsection 5-750(1.5) of the Act (705 ILCS 405/ 5-750(1.5) (West 2014)), and makes no reference to less restrictive alternatives. If, as the State suggests, a finding under subsection 5-750(1.5) was equivalent to a finding under subsection 5-750(1)(b), it would render the latter superfluous. See *People v. Ellis*, 199 Ill. 2d 28, 39 (2002) ("If possible, the court must give effect to every word, clause, and sentence; it must not read a statute so as to render any part inoperative, [or] superfluous.") Accordingly, we find the State's argument unpersuasive.

¶ 26 Because we find that respondent's sentence must be vacated and his case remanded for resentencing, respondent's contention that the trial court did not consider all statutorily-mandated factors is moot and need not be addressed. We do briefly note that an initial conviction of AUUW is a Class 4 felony with a sentencing range of between one and three

years. 720 ILCS 5/24-1.6(d)(1) (West 2014); see also 730 ILCS 5/5-4.5-45(a) (West 2014).[3] Accordingly, respondent's original sentencing of commitment until his 21st birthday, a total term of over 3 years and 11 months, impermissibly exceeded the maximum limit of an adult committing the same offense. See 705 ILCS 405/5-710(7) (West 2014); see also *In re J.T.*, 221 Ill. 2d 338, 351 (2006).

¶ 27 CONCLUSION

¶ 28 For the reasons stated, we affirm respondent's adjudication of delinquency but vacate his sentence and remand for resentencing in accordance with subsection 5-750(1)(b) of the Act.

¶ 29 Affirmed in part; vacated in part; and remanded.

[3]The State argues that respondent was actually convicted of a second AUUW offense, which would entail a class 2 felony with a three to seven year sentencing range. See 720 ILCS 5/24-1.6(d)(1) (West 2014). However, the State cites no prior adjudication of delinquency for AUUW to support its argument. Furthermore, the commitment order itself reflects that respondent was adjudicated delinquent of class 4 AUUW.