2017 IL App (1st) 143039-U
No. 1-14-3039
January 31, 2017

SECOND DIVISION

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	Of Cook County.
Plaintiff-Appellee,	)	
	)	No. 13 CR 18113
v.	)	
	)	
CAMERON FRENCH,	)	The Honorable
	)	Michael B. McHale,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: Testimony that police found a gun on the floor of a van next to the driver's seat sufficed to support an inference that the driver constructively possessed the gun. The trial court committed plain error by admitting into evidence an affidavit in which a police officer said that the state had not issued an FOID card to the defendant.

¶ 2 The trial court found Cameron French guilty of possessing a firearm without a firearm owner's identification (FOID) card. On appeal Cameron challenges the sufficiency of the evidence and the court's decision to admit into evidence a notarized affidavit. We find the evidence sufficient to support the inference that Cameron constructively possessed the gun,

which police found on the floor, next to the driver's seat, of a van Cameron drove. However, following *People v. Diggins*, 2016 IL App (1st) 142088, we find that the trial court committed plain error when it admitted the affidavit into evidence. We reverse and remand for a new trial.

¶ 3 BACKGROUND

¶ 4 Around 10 p.m. on September 7, 2013, Officer C.J. Cuevas of the Chicago Police Department arrested Cameron and charged him with aggravated unlawful use of a weapon based on possession of a firearm without an FOID card.

¶ 5 At the bench trial, Cuevas testified that on September 7, 2013, he saw a minivan pass a stop sign without stopping. His partner pursued the van and persuaded the driver, Cameron, to pull over. As Cuevas approached the van, he smelled marijuana. He ordered Cameron and Cameron's two passengers to get out of the minivan. Cuevas, using a flashlight, looked in the van and saw three small bags of a green substance in a clear plastic cup in front of the radio. As he entered the minivan to take the cup, he saw a black handgun on the floor of the minivan next to the driver's seat. Cuevas testified that the gun lay within an arm's length of Cameron as Cameron drove. Cuevas admitted that he did not see Cameron make any furtive movements.

¶ 6 The State introduced a vehicle record which showed that Vaughn French owned the minivan. No evidence showed any relationship between Cameron and Vaughn. Cameron's counsel did not object to a notarized document on Illinois State Police letterhead, in which Sergeant Craig Nolan of the state police's Firearms Services Bureau said:

> "I *** do hereby certify, after a careful search of the FOID files, the information below to be true and accurate[:] Cameron French *** has never been issued a FOID card as of February 19, 2014."

¶ 7 The court found the evidence sufficient to establish constructive possession of the gun, and the court found Cameron guilty of possessing the gun without an FOID card. The court sentenced Cameron to 18 months of probation and imposed several fees and fines. Cameron now appeals.

¶ 8 ANALYSIS

¶ 9 Cameron raises three arguments on appeal: (1) the evidence does not prove that he possessed the gun; (2) the trial court committed plain error when it admitted into evidence the document stating that Cameron had no FOID card; and (3) the court imposed several inapplicable fines and fees, and failed to permit proper credit against the fines for pretrial incarceration.

¶ 10 Sufficiency of the Evidence

¶ 11 The trial court did not find that Cameron actually possessed the gun. Instead, the court found constructive possession. The State may establish constructive possession of contraband by proving that the defendant (1) knew of the presence of the contraband, and (2) exercised immediate and exclusive control over the area in which police found the contraband. *People v. Schmalz*, 194 Ill. 2d 75, 81 (2000); *People v. Bailey*, 333 Ill. App. 3d 888, 891 (2002). "The rule that possession must be exclusive does not mean that the possession may not be joint [citation]; if two or more persons share immediate and exclusive control or share the intention and power to exercise control, then each has possession."

Schmalz, 194 Ill. 2d at 82. "The element of knowledge may, and most often must, be proved by circumstantial evidence." *People v. Rangel*, 163 Ill. App. 3d 730, 739 (1987). "[S]everal Illinois cases involving contraband found in the accused's car have found that that circumstance, and the fact that it was located in places where he 'could or should have been aware' of it, were sufficient evidence of his knowledge and control in order to sustain convictions for unlawful possession of the contraband." *People v. Burke*, 136 Ill. App. 3d 593, 600 (1985); see also *People v. Wells*, 241 Ill. App. 3d 141, 146 (1993).

¶ 12 In *People v. Davis*, 33 Ill. 2d 134 (1965), police stopped Davis for a traffic violation. When Davis got out of the car, an officer noticed a tinfoil packet on the floor of the car. The *Davis* court held, "[t]he fact that the packets in question were located in places where the defendant could or should have been aware of them is sufficient evidence of his knowledge and control to sustain the conviction herein." *Davis*, 33 Ill. 2d at 139; see also *People v. Whalen*, 145 Ill. App. 3d 125, 130 (1986).

¶ 13 Cameron points out that several factors relevant to an inference of knowledge favor his defense. The State presented no evidence that Cameron had driven the minivan for more than the minute it took for the police to pull him over. See *Bailey*, 333 Ill. App. 3d at 892. Cameron made no furtive movements when police pursued him and ordered him to pull over. See *Bailey*, 333 Ill. App. 3d at 892. Also, Cameron did not own the minivan. However, to support an inference of possession, "[i]t is enough that the defendant was the driver of the vehicle." *People v. McNeely*, 99 Ill. App. 3d 1021, 1025 (1981).

¶ 14 Cameron cites *People v. Hampton*, 358 Ill. App. 3d 1029 (2005), as authority requiring reversal here. In *Hampton*, police ordered Hampton to stop the car he was driving because

the car's temporary registration had expired. Police discovered that Hampton had a suspended license, so they arrested him. A search incident to arrest revealed a gun hidden in a sock in the car's glove compartment. Hampton's father and brother testified that Hampton had never driven the car before, and he had driven it only a few minutes before police stopped him. The appellate court, noting that the evidence showed that Hampton would not have seen the gun in the glove compartment as he drove, held that the evidence did not support the inference that Hampton knew about the gun in the glove compartment.

¶ 15 Here, police found the gun on the car floor and not hidden in a sock in the glove compartment. And in this case, unlike *Hampton*, the defendant presented no evidence to rebut the inference that he should have known about the contraband openly in the car. We find that under the reasoning of *Davis*, the evidence sufficiently shows that Cameron should have known that a gun rested on the floor of the minivan next to his seat. Therefore, we find the evidence sufficient to prove that Cameron constructively possessed the gun.

¶ 16 Hearsay

¶ 17 Next, Cameron argues that the trial court committed plain error when it allowed the State to present a document signed by Sergeant Nolan as evidence that Cameron did not have an FOID card. To show plain error, a defendant must show "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the

closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). First, we determine whether the trial court erred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 18 *Diggins*, 2016 IL App (1st) 142088, controls our resolution of the issue. Prosecutors charged Diggins with possession of a firearm without an FOID card. At trial, the court allowed into evidence a notarized document, signed by a sergeant working for the Firearm Services Bureau, who said he searched FOID files and found that Diggins had no FOID card. The trial court found Diggins guilty as charged. On appeal, the *Diggins* court applied the constitutional principle stated in *Crawford v. Washington*, 541 U.S. 36, 59 (2004): "Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." The *Diggins* court held:

> "[T]he certified letter was an affidavit, as it was a declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths. [Citation.] Moreover, the affidavit was 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' (Internal quotation marks omitted.) *Crawford*, 541 U.S. at 52. *** Additionally, whether defendant owned a FOID card constituted an element of AUUW, which the State had the burden to prove. Accordingly, absent a showing that the witness was unavailable to testify at trial and that defendant had a prior opportunity to cross-examine him, defendant was entitled to be confronted with the witness at trial." *Diggins*, 2016 IL App (1st) 142088, ¶ 16.

¶ 19 Diggins had no opportunity to cross-examine the sergeant, and the State did not prove the sergeant unavailable. The *Diggins* court found that the trial court erred when it admitted the hearsay document into evidence.

¶ 20 Here, Nolan prepared the document at issue after Cameron's arrest, just as the sergeant in *Diggins* prepared the document concerning Diggins's lack of an FOID card after Diggins's arrest. The timing indicates that Nolan prepared the document for use at Cameron's trial. See *Diggins*, 2016 IL App (1st) 142088, ¶ 16. Cameron had no opportunity to cross-examine Nolan, and the prosecution did not contend that Nolan was unavailable. Accordingly, we find that the trial court violated Cameron's right to confront the witnesses against him when it admitted the notarized document into evidence as proof of the matter Nolan asserted in his statement made out of court.

¶ 21 We find the violation of Cameron's confrontation rights sufficiently clear or obvious to constitute plain error. See *Sargent*, 239 Ill. 2d at 189-91. Therefore, we must determine whether "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant." *Sargent*, 239 Ill. 2d at 189. The prosecution presented no evidence other than the hearsay statement to prove that Cameron had no FOID card, an essential element of the charge against Cameron. See *Diggins*, 2016 IL App (1st) 142088, ¶ 18. The erroneous admission into evidence of the document, with its hearsay not subject to cross-examination, prejudiced Cameron. Accordingly, we find that the plain error rule requires reversal of the conviction and remand for a new trial. See *Diggins*, 2016 IL App (1st) 142088, ¶ 19.

¶ 22 Because we reverse the conviction, we vacate all the fines and fees the trial court assessed.

¶ 23 CONCLUSION

¶ 24 We find the evidence sufficient to support an inference that Cameron constructively possessed the firearm. However, the trial court committed plain error when it admitted into evidence a document in which Sergeant Nolan made a testimonial assertion that Cameron had no FOID card. Accordingly, we reverse the trial court's judgment and remand for a new trial.

¶ 25 Reversed and remanded.