2017 IL App (1st) 152629-U

No. 1-15-2629

Order filed December 15, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 C6 61124
	)	
ANTHONEY E. GALVAN,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The record on appeal is insufficient for this court to review defendant's contention that an oral statement he made to the police should have been suppressed due to the police not giving him *Miranda* warnings. The evidence was sufficient to prove defendant guilty beyond a reasonable doubt of armed violence.

¶ 2 Following a bench trial, defendant Anthoney E. Galvan was found guilty of one count of armed violence and one count of possession of a controlled substance. At sentencing, the trial court merged the counts and sentenced defendant to 15 years in prison for armed violence. On

appeal, defendant contends that an oral statement he made outside his house should have been suppressed because it was made after he was arrested and in response to police interrogation, but he was not apprised of his *Miranda* rights. Defendant argues that the gun subsequently found in his bedroom and his ensuing written statement should have been suppressed as fruit of the poisonous tree; that his trial counsel was ineffective for not filing a motion to suppress; and that the issues involving suppression may be reached via plain error. Defendant also challenges the sufficiency of the evidence to convict him of armed violence. For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the events of August 23, 2013. Following his arrest, defendant was charged with one count of armed violence and one count of possession of a controlled substance. Defendant did not file a motion to suppress evidence prior to trial.

¶ 4 At trial, Harvey police detective J. Esparza testified that on the day in question, he was part of a team executing a search warrant at a two-story single family residence at 15507 Dixie Highway. Esparza related that when he and the other officers arrived at the house, they knocked on the door but received no response. Accordingly, they forced entry. With regard to layout of the house, Esparza explained that immediately inside and to the left of the front door, there was a winding staircase to the second floor, with a landing between floors. Upon entering the house, Esparza immediately headed up the stairs. When he reached the landing, he could see a man, identified in court as defendant, sitting on a bed in an upstairs room. As Esparza continued up the stairs, defendant looked in Esparza's direction, got up, and ran toward an adjoining bedroom. When Esparza reached the first room, he saw defendant, who was about five feet from Esparza, make a "throwing motion" toward a window in the adjoining bedroom. Esparza detained

defendant, "then gave him -- the custody over to Detective McCalpine," and went outside. Underneath the window, Esparza found a clear plastic bag containing a white powdered substance. Esparza recovered the bag.

¶ 5 Esparza testified that by this point, "Detective McCalpine had [defendant] outside of the residence." Esparza approached and spoke with defendant. The prosecutor asked Esparza about their exchange as follows:

> "Q. Okay. And did you ask the defendant about the substance you recovered?
>
> A. Correct.
>
> Q. And what did he say?
>
> A. He verbally stated to me that it was his for his personal use, and for his female friends when they would come over.
>
> Q. And did you ask the defendant anything else at that time?
>
> A. Yes, I asked him if he had anything else illegal in that bedroom.
>
> Q. And did he respond?
>
> A. Yes, he responded telling me that there was a loaded handgun right in the mattress where he was sitting at."

¶ 6 Following this conversation with defendant, Esparza went to the room where he had first observed defendant and found a loaded .32 caliber handgun between the mattress and box spring, right where defendant had been sitting. He explained that he did not need to lift the mattress or box spring to see the gun, as it was partially protruding from the mattress. Esparza recovered the gun.

¶ 7 Esparza testified that after defendant was transported to the police station, he read defendant his *Miranda* rights from a preprinted form. Defendant wrote the word "yes" after each statement on the form and then signed it. Finally, Esparza testified that he inventoried the bag he had recovered at the scene and sent it out for testing and analysis.

¶ 8 On cross-examination, Esparza testified that the search warrant was not in defendant's name but, rather, was in his brother's. He agreed that the team executing the warrant consisted of approximately six other officers, and that prior to its execution, they "worked out who was going to do what," with two or three officers entering the front door and other officers stationed behind the house. Esparza clarified that the front door was unlocked, and stated that he announced "Harvey police, search warrant" while knocking on the door, which he did twice, and again several times while climbing the stairs to the second floor. Esparza agreed that he spoke loudly enough while knocking on the door that whoever was in the house should have heard him. He also testified that he had his gun drawn as he was going up the stairs and agreed with defense counsel's statement that "[t]he minute you announce your presence as you're going up the door, [defendant] gets up and he runs *** to the window[.]"

¶ 9 Esparza further testified on cross-examination that after he saw defendant throw an object out the window, he told defendant to show his hands. When defendant complied, Esparza put his gun away and handcuffed defendant behind his back. During this time, other police officers were "going through" the rest of the house. After defendant was handcuffed, Detective McCalpine arrived upstairs and McCalpine and Esparza "continue[d] going through the bedroom." Esparza acknowledged that even though he looked around for contraband, he did not see the butt of a gun

between the mattress and box spring. Later, when he saw the gun, he did not take a photo of it right away. Instead, he recovered the gun, made it safe, and placed it on the middle of the bed.

¶ 10 Harvey police detective McCalpine testified that he was part of the team that executed the search warrant for 15507 Dixie Highway on August 23, 2013. After the search, McCalpine relocated to the police department, where defendant was read his *Miranda* rights by Detective Esparza in McCalpine's presence. McCalpine then had a conversation with defendant which was reduced to a typewritten statement. In the written statement, which defendant reviewed and signed, defendant related that on the date in question, he was in his bedroom when he heard a "boom." He ran to the window and threw a bag of 3.7 grams of cocaine out of it. The police detained him, and he later told the police that he bought two ounces of cocaine two weeks prior, that he had been selling it and using it for personal use, that the gun found in the bedroom was his, and that he kept it near him in his room for protection because his brother had recently been shot. Defendant also related that he sometimes used crack cocaine with girls.

¶ 11 On cross-examination, McCalpine testified that when he went upstairs, Esparza had defendant detained by the stairwell. When Esparza left, McCalpine "just stood by with the defendant until Detective Esparza came back."

¶ 12 The parties stipulated that if called as a witness, a chemist with the Illinois State Police Crime Laboratory would have testified that he analyzed the substance in question and determined it weighed 4.7 grams and tested positive for cocaine. The parties also stipulated as to proper chain of custody of the cocaine.

¶ 13 Defendant made a motion for a directed finding on the charge of armed violence, which the trial court denied. Defendant did not testify or present any evidence.

¶ 14 The trial court found defendant guilty of armed violence and possession of a controlled substance. Defendant thereafter filed a motion to reconsider or for a new trial. Following argument, the trial court denied the motion. At sentencing, the trial court merged the possession of a controlled substance count into the armed violence count and imposed a term of 15 years' imprisonment.

¶ 15 Defendant's first contention on appeal is that the oral statement he made outside his house should have been suppressed because he was not apprised of his *Miranda* rights at the time he made the statement, despite having been arrested and being subjected to custodial interrogation by the police. Defendant argues that that the gun found in his bedroom and his subsequent written statement must in turn be suppressed as fruit of the poisonous tree. He asserts that his trial counsel was ineffective for not filing a motion to suppress the initial statement and its fruits, and further argues that the suppression issue may be reached via either prong of the plain error doctrine. As relief, defendant seeks outright reversal of his conviction for armed violence or, in the alternative, reversal of his conviction for armed violence and remand for a new trial.

¶ 16 The State responds that the record is inadequate to resolve defendant's claims of plain error and ineffective assistance of counsel, and that therefore, his claims are better suited to a collateral proceeding. The State further asserts that should this court reach defendant's claims, the totality of the facts and circumstances found in the record nevertheless establish that *Miranda* warnings were not required for several reasons, including that: although defendant was detained and possibly still in handcuffs at the time he made the initial statement, he was not "in custody" for *Miranda* purposes; defendant was not subjected to interrogation outside his house, but rather,

general, on-the-scene investigatory questioning that related to the execution of the search warrant and did not trigger *Miranda*; and the questions asked of defendant were proper under *Miranda*'s public safety exception. Further, the State maintains that defendant is unable to establish the prejudice necessary for a claim of plain error or ineffectiveness where, even if the initial statement was suppressed, the other evidence supporting his armed violence conviction was not fruits of the poisonous tree, but rather, admissible where the written statement was voluntarily made after *Miranda* warnings were given and where the gun inevitably would have been discovered lawfully during the execution of the search warrant. Finally, the State argues that should this court somehow find plain error or that trial counsel was ineffective, the proper remedy would be to remand for a suppression hearing.

¶ 17 We agree with the State that we cannot resolve defendant's claims on the record before us. Our supreme court has recently observed that when the record is incomplete or inadequate for resolving a claim of ineffective assistance of counsel on direct appeal, such claims may sometimes be better suited to collateral proceedings, and that reviewing courts should carefully consider whether to reach such claims on a case-by-case basis. *People v. Veach*, 2017 IL 120649, ¶¶ 46, 48. Consistent with *Veach*, this court has held that where a defendant's claim of ineffectiveness for failure to file a motion to suppress requires consideration of matters outside of the record, including evidence necessary to assess police conduct, such a claim is more appropriately addressed on collateral review. *People v. Evans*, 2015 IL App (1st) 130991, ¶ 34. Similarly, where a defendant claims for the first time on appeal that a statement should have been suppressed, but the record is inadequate to determine whether any error occurred, " 'we will

not speculate as to whether the admission of evidence was plain error.' " *People v. Conley*, 118 Ill. App. 3d 122, 131 (1983) (quoting *People v. Calderon*, 101 Ill. App. 3d 469, 476 (1981)).

¶ 18 Here, the record is devoid of factual information on numerous points pertinent to defendant's claim that his oral statement should have been suppressed because he was not given *Miranda* warnings. Whether *Miranda* warnings must be given depends on a range of factors, including the time and place of the confrontation, the number of police officers present, the presence or absence of family or friends, indicia of formal arrest such as physical restraint or show of weapons, the manner by which the individual arrived at the place of questioning, the length and mode of the questioning, and the focus of the police investigation. See *People v. Jordan*, 2011 IL App (4th) 100629, ¶ 18. Yet, the record in the instant case does not reveal how defendant arrived at the outside of his house, whether defendant was still handcuffed, who else other than Detective Esparza and defendant was present, whether there was a show of weapons at the time, or what or how many questions Esparza posed to defendant. Most important, the record is silent as to whether Esparza or any other officer actually did or did not advise defendant of his *Miranda* rights. Defendant proposes that "[t]he testimony of the officers regarding their elaborate procedures in informing defendant of his *Miranda* rights at the police station *** leads to the conclusion that if they had read defendant his *Miranda* rights before the first interrogation at defendant's house, they would have testified in detail to that fact as well." We disagree with defendant's speculative reasoning. At trial, neither the prosecutor nor defense counsel asked Esparza for details about the conversation he had with defendant outside the house. Absent such questioning, there would be no opportunity for Esparza to "testif[y] in detail" as to whether or not he informed defendant of his *Miranda* rights at that time.

¶ 19 The record as it exists in this case is inadequate for us to adjudicate whether the police acted lawfully under the circumstances, whether defense counsel's decision not to file a motion to suppress was strategic, or whether such a motion likely would have been granted. Given the inadequacy of the factual record with regard to the circumstances of defendant's oral statement, we decline to review defendant's claims of ineffectiveness or plain error in this appeal. See *Veach*, 2017 IL 120649, ¶ 46; *Conley*, 118 Ill. App. 3d at 131-32.

¶ 20 Defendant's second contention on appeal is that the State failed to prove him guilty of armed violence beyond a reasonable doubt. Specifically, defendant argues that at the time the police entered his bedroom, he did not have intent and capability to maintain control and possession of the gun or to keep it immediately accessible. Defendant's argument relies upon the factual circumstance that he ran away from the gun when Esparza announced his office, and that he was then handcuffed in the adjoining bedroom and thus had no additional opportunity to reach for the weapon.

¶ 21 When reviewing the sufficiency of the evidence, the relevant inquiry is 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. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 131 (1999). Reversal is justified only where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 22 To prove armed violence as charged in the instant case, the State was required to establish that defendant, while armed with a dangerous weapon, committed the offense of possession of a controlled substance. 720 ILCS 5/33A-2(a), 570/402(c) (West 2012). Defendant does not contest his guilt of possession of a controlled substance. Rather, he disputes that he was armed when he committed this underlying felony. A person is considered to be "armed with a dangerous weapon" for purposes of the armed violence statute when he carries on or about his person or is "otherwise armed" with a dangerous weapon. 720 ILCS 5/33A-1(c)(1) (West 2012). Our supreme court has refined the definition of "otherwise armed" to mean having had immediate access to or timely control over a weapon "when the police entered." *People v. Condon*, 148 Ill. 2d 96, 110 (1992). It is not necessary that a defendant be "otherwise armed" at the moment of arrest. *People v. Harre*, 155 Ill. 2d 392, 401 (1993). Instead, the critical timing question is whether the defendant has immediate access to or control over a weapon at a time when there is the immediate potential for violence. *People v. Anderson*, 364 Ill. App. 3d 528, 541-42 (2006).

¶ 23 Here, Detective Esparza testified that he loudly announced "Harvey police, search warrant" twice while knocking on the front door and again several times while climbing the stairs to the second floor. When Esparza reached the staircase landing, he could see defendant sitting on a bed in an upstairs room. Defendant looked at Esparza before getting up and running to a nearby window. Later, Esparza found a loaded handgun right where defendant had been sitting, partially protruding from between the bed's mattress and box spring. We find that these circumstances establish defendant had immediate access to a weapon when the police arrived on the scene, at a time when there was immediate potential for violence. The police had announced

their presence before entering the front door and while ascending the stairs, and defendant did not move away from the gun until after he had looked at Esparza approaching on the staircase. During the time Esparza was heading upstairs toward defendant, defendant could have grabbed the protruding gun without even having to lift the mattress he was sitting on. As such, we find that defendant was "otherwise armed" under the meaning of the armed violence statute. See, *e.g.*, *People v. Cervantes*, 2013 IL App (2d) 110191, ¶ 19 (the defendant was "otherwise armed" where, at the time the police entered the room, he was kneeling "practically" next to the side of the bed where the gun was located); *People v. Scott*, 2011 IL App (2d) 100990, ¶ 30 (the defendant was "armed with a dangerous weapon" where, at the time the police arrived outside his apartment, he was lying on a couch, "perhaps" a foot or two away from the love seat under which he had placed a shotgun).

¶ 24 We are not persuaded by defendant's citation to *People v. Rivera*, 260 Ill. App. 3d 984 (1994), *People v. King*, 155 Ill. App. 3d 363 (1987), or *People v. Smith*, 191 Ill. 2d 408 (2000), as each of these cases is distinguishable.

¶ 25 In *Rivera*, after the police confronted the defendant outside, he fled into his apartment, through the living room, into the kitchen, and then out the back door and upstairs. *Rivera*, 260 Ill. App. 3d at 984. After the defendant was apprehended, the police recovered a handgun from the kitchen and the defendant was convicted of, *inter alia*, armed violence. *Id.* at 987-88, 993-94. This court reversed, finding that it was not the intent of the legislature for a defendant to be convicted of armed violence simply because a weapon was located anywhere in the defendant's home, and that there must be a relationship between the weapon and the defendant or the potential hazard which exists while the defendant is armed while committing a felony. *Id.* at 993.

¶ 26 In *King*, the defendant met a number of officers at her front door and admitted them into her apartment to execute a search warrant. *King*, 155 Ill. App. 3d at 365. The officers discovered a gun in a bedroom and the defendant was convicted of armed violence in addition to various underlying felonies. *Id*. This court determined that the defendant was not armed with a dangerous weapon for purposes of the armed violence statute, reasoning that the mere physical existence of a weapon in any location is insufficient to support an armed violence charge, and that there must be a "relationship between the weapon and the defendant or that potential hazard to support an armed violence conviction and neither was existent in this case." *Id*. at 370.

¶ 27 In both *Rivera* and *King*, there was no question that the guns at issue were not in the defendants' immediate reach when the police entered the defendants' residences. Here, in contrast, defendant was practically sitting on top of and thus had immediate access to a gun when Esparza entered his house and started climbing the stairs. Therefore, *Rivera* and *King* are readily distinguishable on their facts.

¶ 28 *Smith*, while factually distinct from *Rivera* and *King*, also does not change our decision. In *Smith*, the police had a search warrant for the defendant's apartment. *Smith*, 191 Ill. 2d at 410. As the police approached the apartment building, they saw the defendant drop a handgun out of the apartment window. *Id*. The police thereafter entered the apartment and found contraband. *Id*. Our supreme court reversed the defendant's conviction of armed violence, finding that he did not have immediate access to or timely control over a weapon when the police entered "because he dropped the gun out of the window as soon as he became aware that police were approaching." *Id*. at 412. For the same reason, the court found the defendant did not have the intent and capability to maintain control and possession of the weapon. *Id*. The court explained:

> "Permitting an armed violence conviction to stand against a felon such as defendant, who exhibited no propensity to violence and dropped the unloaded gun out of the window as the police approached his apartment to search for drugs, would not serve, but rather would frustrate, the statute's purpose of deterring criminals from involving themselves and others in potentially deadly situations." *Id*. at 412-13.

¶ 29 Here, unlike *Smith*, defendant did not rid himself of a weapon the moment he became aware of a police presence. Instead, after the police knocked on the front door and loudly announced their office twice, he sat on a bed where a loaded gun was protruding from between the mattress and box spring while an officer climbed the stairs toward him and continued to announce, "Harvey police, search warrant." Only after the officer was partway up the staircase did defendant make a move to divest himself of contraband, and then, it was drugs that he threw from a window, not the gun. Unlike *Smith*, here, defendant did not abandon a weapon before its presence created the type of danger that the armed violence statute was intended to prevent. Rather, defendant had immediate access to a weapon at a time when there was immediate potential for violence. *Smith* is distinguishable.

¶ 30 After reviewing the evidence in the light most favorable to the prosecution, which we must, we conclude that the evidence was not "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to defendant's guilt. *Slim*, 127 Ill. 2d at 307. Accordingly, defendant's challenge to the sufficiency of the evidence fails.

¶ 31 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 32 Affirmed.