FIRST DIVISION
May 8, 2017

No. 1-16-3164
2017 IL App (1st) 163164-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE INTEREST OF KEVIN S., a minor,	)	
	)	Appeal from the
(THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County.
Petitioner-Appellee,	)	
	)	
v.	)	No. 16 JD 2112
KEVIN S.,	)	
	)	
	)	Honorable
Respondent-Appellant.)	)	Lana Charise Johnson,
	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* The State proved respondent guilty of AAUW based on not having been issued a currently valid FOID card; the trial court properly complied with section 5-750 of the Juvenile Court Act before committing respondent to the DOJJ; the one-act, one-crime rule requires this court to vacate all but one of respondent's adjudications for AAUW based on his possession of a firearm; remanded to trial court for a determination of which AAUW count was more serious.

¶ 2 The respondent-appellant Kevin S., a minor, appeals from his adjudication of delinquency and dispositional order of commitment. Respondent was found guilty on four

counts of aggravated unlawful use of a weapon (AUUW) and one count of unlawful possession of a firearm and firearm ammunition. He was committed to the Juvenile Department of Corrections (DOJJ) until he reaches the age of 21, or earlier if the DOJJ so decides. On appeal, respondent contends that: (1) the State failed to prove him guilty of AUUW based on not having been issued a currently valid firearm owner's identification (FOID) card because the State failed to prove beyond a reasonable doubt that he did not have a valid FOID card; (2) he should receive a new sentencing hearing because the trial judge failed to comply with the Juvenile Court Act of 1987 (Act) before committing respondent to the DOJJ; and (3) his convictions violate the one-act, one-crime rule. For the following reasons, we affirm the judgment of the circuit court and remand the cause for resentencing.

¶ 3 BACKGROUND

¶ 4 On September 19, 2016, the State filed a petition for wardship alleging that on September 18, 2016, respondent, age 17, committed four counts of AUUW, 720 ILCS 5/24-1.6(a) (West 2014), and one count of unlawful possession of a firearm and firearm ammunition. 720 ILCS 5/24-3.1(a)(1) (West 2014).

¶ 5 At trial, Sergeant Sidney Pennix testified that at 2:27 p.m. on the date in question, he received a call about two men with guns. He went to the area, and saw respondent, who matched the description Sergeant Pennix had received, standing on the corner. Sergeant Pennix called for backup as he watched respondent and two other individuals go to a nearby porch and start knocking on the door and window. Sergeant Pennix testified that he exited his vehicle and then the three men started running. Sergeant Pennix chased respondent through a vacant lot and into a covered gangway. Sergeant Pennix testified that he saw respondent pull out a black gun and push it over the fence that blocked his path at the end of the gangway. Sergeant Pennix then

arrested respondent. Sergeant Pennix testified that respondent was under the age of 21, did not have a valid FOID card, and was not engaging in any activities under the Wildlife Code.

¶ 6 Officer Curran testified that on the date in question he responded to a call with his partner, Officer Elliot. When they arrived, Sergeant Pennix already had respondent in handcuffs. Officer Curran was instructed to go find the firearm, and was directed to a backyard on the other side of the fence from where defendant threw the gun. Officer Currant entered the backyard and recovered a .40 caliber Smith and Wesson firearm. It was loaded with approximately 14 rounds.

¶ 7 Officer Elliot testified to substantially the same facts as Officer Curran.

¶ 8 The trial court made a finding of delinquency on all counts, with counts 3 and 4 merging into counts 1 and 2. The trial court noted that the "officers [were] more than credible," and that "their stories were consistent."

¶ 9 At the sentencing hearing, the trial court heard evidence in aggravation and in mitigation. In aggravation, the State introduced two sentencing orders entered in a different case involving respondent. The State requested that respondent be sentenced as a Class 2 felon based on the fact that this was his second firearm charge. The State also noted that respondent had been arrested 26 times, 8 times for felonies and 13 times for misdemeanors. It was also noted that respondent had four findings of delinquency, one of which was the gun case related to the sentencing orders tendered. He also had two findings of delinquency for trespass to land. Respondent was not compliant with probation on those cases and had been placed on intensive probation services (IPS). Respondent's probation officer noted that he did not have an opportunity to implement full services because respondent was continuously violating the terms of his probation. A gang information report indicated that respondent was a self-admitted

member of the Black Disciples, which was "currently involved in a high-level gang conflict with the Brick Squad Gangster Disciples."

¶ 10 Finally, respondent had posted a picture to social media the day before his arrest which depicted him and other individuals flashing firearms and identified either himself or others he was with as "shooters." The court noted that the picture contained a "big gun" and stated that "somebody is smoking marijuana in the photo."

¶ 11 When respondent requested that the court follow the probation officer's recommendation of probation, the court stated, "I'm sorry. I didn't mean to laugh."

¶ 12 In mitigation, respondent's counsel stated that respondent had serious mental health problems that were more likely to be treated out of custody, and that respondent had previously been to the DOJJ and that had not worked.

¶ 13 The trial court stated, "[respondent] thinks he can mean-mug me or something * * * I'm not afraid of you, just in case you thought that looking at me like that was intimidating me. Okay? It's not."

¶ 14 Respondent's probation officer stated that respondent started with probation in 2012, but has continued to pick up cases. He stated that respondent has been to both inpatient and outpatient drug treatment and continues to defy his probation order. The trial court noted that during a previous intensive probation sentencing, the court had ordered respondent "not to place crap on social media," yet it had 12-20 pictures that respondent posted the day before his arrest, revealing him "holding numerous weapons on the street."

¶ 15 The trial court found that secure confinement was necessary to ensure the protection of the public from the consequences of respondent's criminal activity. The court noted that it had reviewed respondent's age; criminal background; educational background; physical, mental and

emotional health; viability of community-based services; and services with the DOJJ. The court stated that "reasonable efforts have been made to prevent or eliminate the need for the minor to be removed from the home," and "reasonable efforts cannot, at this time, for good cause shown, prevent or eliminate the need for removal." Accordingly, the court sentenced respondent as a Class 2 felon and committed him to the DOJJ until he turned 21, or earlier, if the DOJJ so decides.

¶ 16 ANALYSIS

¶ 17 On appeal, respondent contends that the State failed to prove beyond a reasonable doubt that he committed the offense of AUUW based on not being issued a currently valid FOID card, that the trial court failed to adhere to the Act when deciding to commit him to the DOJJ, and that his adjudication of delinquency violated the one-act, one-crime rule.

¶ 18 AUUW

¶ 19 Respondent's first argument is that the State failed to meet its burden because in viewing the evidence in the light most favorable to the State, no rational trier of fact could find that the State proved beyond a reasonable doubt that respondent did not have a currently valid FOID card. Counts 1 and 3 were based on respondent's possession of a firearm without having been issued a "currently valid Firearm Owner's Identification (FOID) card." 720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2014). Respondent alleges that the only evidence supporting these two counts was Sergeant Sidney Pennix's testimony that respondent "didn't" have a currently valid FOID card, which was not corroborated by any documentation or other substantive evidence.

¶ 20 The State maintains that Sergeant Pennix's testimony was sufficient to establish beyond a reasonable doubt that respondent was guilty of AUUW, based upon his unlawful possession of a weapon without having been issued a currently valid FOID card.

¶ 21 When a finding of delinquency is challenged on appeal based on the sufficiency of the evidence, the applicable standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the delinquency petition were proved beyond a reasonable doubt. *In re W.C.*, 167 Ill. 2d 307, 336 (1995). The evidence "must be considered in the light most favorable to the prosecution," which means "the reviewing court must allow all reasonable inferences from the record in favor of the prosecution." (Internal quotation marks omitted.) *People v. Wheeler*, 226 Ill. 2d 92, 116-17 (2007). "Circumstantial evidence is sufficient to sustain a criminal conviction, provided that such evidence satisfies proof beyond a reasonable doubt of the elements of the crime charged." *People v. Hall*, 194 Ill. 2d 305, 330 (2000). A reviewing court "is not required to search out all possible explanations consistent with innocence or be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. On the contrary, we must ask, after considering all the evidence in the light most favorable to the prosecution, whether the * * * evidence [in the record] could reasonably support a finding of guilt beyond a reasonable doubt." *Wheeler*, 226 Ill. 2d at 117-18.

¶ 22 In the case at bar, the only testimony regarding respondent's possession of a FOID card was the following colloquy that took place during the direct examination of Sergeant Pennix:

"Q: Did respondent have a current valid Firearms Owner's Identification card?

A: He didn't."

¶ 23 Respondent contends that this exchange was not enough to prove beyond a reasonable doubt that respondent did not possess a currently valid FOID card. However, respondent does not point to any Illinois authority that requires more than a police officer's testimony to prove

this element of the offense. We find *People v. Grant*, 2014 IL App (1st) 100174-B, to be instructive. In *Grant*, the following exchange took place between the State and an officer:

"Q. Officer, did you ask the defendant if he had a current valid FOID card?

A. Yes.

Q. Did he state he had one?

A. He said he did not.

Q. Did he ever at any point in time present you with a current valid firearms owner identification card?

A. No."

¶ 24 On appeal, the defendant argued that because the State "failed to present evidence independent of his statement to police, the State could not have proved the commission, or *corpus delicti*, of the offense, *i.e.*, that the defendant had not been issued a valid FOID card at the time of his arrest." *Grant*, 2014 IL App (1st) 100174-B, ¶ 27. This court noted that the defendant did not dispute the officer's testimony that he never produced a valid FOID card. *Id*. ¶ 29. This court further noted that "[t]he law in Illinois does not require the State to prove a negative and we decline to do so in this case." *Id*. ¶ 30.

¶ 25 Likewise in the case at bar, respondent did not dispute Sergeant Pennix's testimony regarding his lack of a FOID card. Considering that we are obligated to review the evidence in the light most favorable to the prosecution, and that the undisputed testimony was that respondent did not have a currently valid FOID card, we find that a rational trier of fact could reasonably conclude that respondent had not been issued a valid FOID card at the time of his arrest.

¶ 26 Juvenile Court Act

¶ 27 Respondent's next argument on appeal is that his case should be remanded for a new sentencing hearing where the trial court failed to comply with section 5-750 of the Act, 705 ILCS 405/5-750 (West 2014), before committing respondent to the DOJJ. The State maintains that the trial court complied with section 5-750 of the Act and properly sentenced respondent to the DOJJ.

¶ 28 A trial court's decision to send a minor to DOJJ is reviewed for an abuse of discretion. *In re M.Z.*, 296 Ill. App. 3d 669, 674 (1998). However, the question of whether the court complied with statutory requirements is a question of law we review *de novo*. *In re Raheem M.*, 2013 IL App (4th) 130585, ¶ 45.

¶ 29 Section 5-750 of the Act provides in pertinent part:

> "(1) Except as provided in subsection (2) of this Section, when 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 (1) his or her parents, guardian or legal custodian are unfit or unable, for some reason other than financial circumstances alone, to care for, protect, train or discipline the minor and the public will not be served by placement under Section 5-740, or it is necessary to ensure the protection of the public from the consequences of criminal activity by the delinquent; and (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. Before the court commits a minor to the Department of Juvenile

Justice, it shall make a finding that secure confinement is necessary." 705 ILCS 405/5-750 (West 2014).

¶ 30 Here, during sentencing, the trial court stated that respondent's "parents, guardian, legal custodian are unfit or unable for some reason other than financial circumstances alone to care for, protect, train, or discipline the minor or are unwilling to do so; and the best interest of the minor and the public will not be served by placement." The court stated that it was necessary to "ensure the protection of the public * * * from the consequences of the criminal activity of [respondent]." The court found that secured confinement was necessary after review of the following individualized factors: respondent's age; his extensive criminal background; results of any assessments; educational background; physical, mental, and emotional health (including psychiatric placement that respondent did not comply with); and the viability of community-based services. The court also noted that "[r]easonable efforts have been made to prevent or eliminate the need for the minor to be removed from the home," and that "[r]easonable efforts cannot at this time for good cause shown prevent or eliminate the need for removal." The trial court found that removal from the home was in the best interest of respondent, respondent's family, and the public, and that "reasonable efforts were made to locate less-restrictive alternatives to secured confinement and were unsuccessful."

¶ 31 Respondent contends that despite this language, the trial court did not review any evidence indicating that efforts were made to locate less restrictive alternatives to secure confinement, and the reasons why efforts were unsuccessful. Respondent states that there was no testimony or evidence submitted showing that any other efforts were made to find a less restrictive alternative to the DOJJ and why those efforts were unsuccessful. Respondent claims this case is analogous to *In re Raheem M.*, 2013 IL App (4th) 130585, where the reviewing court

remanded for a new sentencing hearing after finding that the trial court did not comply with section 5-750 of the Act. In that case, reviewing court noted:

> "We recognize the form sentencing order recites the trial court received and reviewed evidence concerning efforts to identify a less restrictive alternative to commitment to the DOJJ. However, the record before this court, which appears to be complete, contains no evidence regarding efforts to identify a less restrictive alternative to secure confinement, either in the social history report or at the sentencing hearing. The form sentencing order also states the court reviewed and considered results of assessments of the minor. However, the minor was not evaluated or assessed in any manner to determine whether community-based services could eliminate any perceived need to incarcerate respondent. Last, the form sentencing order states the court reviewing community-based services provided to the minor and compliance with and the outcome of those services. However, no services were provided to the minor, so he had no opportunity to demonstrate compliance." *Id.* ¶ 47.

¶ 32 The court in *Raheem M.* also stated that prior to committing a juvenile to the DOJJ, a trial court "must have before it evidence of efforts made to locate less restrictive alternatives to secure confinement and the court must state the reasons why said efforts were unsuccessful." *Id*. The court noted that this was "not some *pro forma* statement to be satisfied by including the language of the statute in a form sentencing order. Actual efforts must be made, evidence of those efforts must be presented to the court, and if those efforts prove unsuccessful, an explanation must be given why the efforts were unsuccessful." *Id.* ¶ 50.

¶ 33 We find *Raheem M.* to be clearly distinguishable. First, the respondent in *Raheem M.* had never been previously charged with a criminal offense. *Id.* ¶ 12. Raheem M. had never had a community-based sentence. *Id.* His offense would have been a misdemeanor but for the incidental contact with a lunchroom monitory. *Id.* ¶ 56. Raheem M. was not assessed or evaluated in any manner to determine whether community-based services could eliminate any perceived need to incarcerate him. *Id.* ¶ 47. Raheem M.'s uncle was willing to have Raheem live with him and assured the court he would provide for him and enroll him in church and community activities. *Id.* ¶ 16. The court failed to explain why this alternative to incarceration was not acceptable. *Id.* ¶ 54.

¶ 34 We find this case instead to be analogous to *In re Ashley C.*, 2014 IL App (4th) 131014. In *Ashley C.*, The reviewing court noted that the respondent was on her fourth juvenile adjudication, that the trial judge had worked over the years to keep Ashley C. in the community, and that the trial judge was familiar with Ashley C. and the services available and offered to her. The court had placed Ashley C. on probation for five misdemeanors in two separate cases in 2011. In 2012, the court again placed the respondent on probation for felony burglary. During these periods of probation, respondent was evaluated four times for substance-abuse treatment. She left in-patient treatment against staff advice, missed appointments for her evaluations, and failed to complete evaluations because she was detained as a result of criminal conduct. The court was aware of respondent's mental health history, and counseling. *In re Ashley C.*, 2014 IL App (4th) 131014, ¶¶ 26-28. The court found that after having made every effort to keep the respondent in the community for over two years, the court recognized all local resources had been exhausted and protection of the public necessitated respondent's incarceration. On appeal,

the court ultimately found that the trial court had properly complied with the Act and that it did not abuse its discretion in sentencing the respondent to the DOJJ. *Id*. ¶ 30.

¶ 35 We find the circumstances in this case to be similar, if not more egregious, than those in *Ashley C*. Here, the social investigation report that appears in the record indicates that respondent was arrested 26 times with 8 felonies and 13 misdemeanors. He had two informal adjustments, ten court referrals, and five findings of delinquency. Five juvenile arrest warrants had been issued and executed for respondent, and he had been detained nineteen times. The social investigation report indicated that respondent's mother stated that respondent was a good child until he started using marijuana. Respondent stated that he used to spend time with his mother outside of the house, but explained that "he does not anymore because he feels that it is not safe for her to be seen with him because of his gang involvement." Respondent admitted he smokes marijuana daily and has never attempted to quit. The report indicated that he "has been to inpatient drug treatment but stated that he did not need to return." According to a psychological assessment completed in 2013, respondent was hospitalized in 2009 for threats to kill family members, peers, and authority figures. He was again hospitalized in 2013 for behavior problems and running away from home.

¶ 36 The social investigation report further indicated that the probation department had not had an opportunity to implement full services for respondent because he violated his terms of probation when he was placed on IPS in January 2016. At the sentencing hearing, the probation officer recommended giving 3 years of probation, with the first 30 days on electronic monitoring.

¶ 37 The probation officer testified at the sentencing hearing that respondent "started with probation in, I believe 2012, and has had numerous services, and continues to pick up cases." The trial judge had presided over previous adjudications involving respondent, and told him in

reference to pictures she saw of him posted on social media holding weapons: "I'm pretty sure at some point during one of the probations – intensive probation sentencing, I ordered [respondent] not to place crap on social media. * * * we've tried to help you through probation – intensive probation services – and sometimes you just meet minors that just don't want any help * * * ."

¶ 38 There is no question that the trial judge in this case was familiar with respondent and his criminal history. She was also familiar with his gang involvement and chronic drug use. She knew that he had violated prior probation terms. We find that the trial court properly complied with the statutory requirements of the Act when she determined that commitment to the DOJJ was 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. Further, based on the record before us, it is clear that the trial court did not abuse its discretion in committing respondent to the DOJJ.

¶ 39 One-Act, One-Crime

¶ 40 Respondent's final contention on appeal is that his convictions violate the one-act, one-crime rule. Specifically, defendant contends that he can only have one conviction for AUUW because his AAUW convictions were based on his possession of a single, loaded firearm. The State agrees that only one count of AUUW can serve as the basis for respondent's adjudication of delinquency.

¶ 41 Under the one-act, one-crime rule a defendant may not be convicted of multiple offenses that are based upon the same single physical act. *People v King*, 66 Ill. 2d 551, 566 (1977). This rule applies to juvenile adjudications. *In re Samantha V.*, 234 Ill. 2d 359, 375 (2009). There is no dispute here that respondent only possessed one handgun, and thus the two convictions[1] of AUUW were based on the same physical act. When this happens, the respondent should be

[1] Counts 3 and 4 were merged into Counts 1 and 2.

sentenced on the most serious offense and the less serious offense should be vacated. *Id*. at 379. However, both offenses were charged as Class 2 felonies based upon a previous weapons conviction. If the punishments are identical, we are instructed to consider which offense has the more culpable mental state. *Id*. Here, both statutes have identical mental states. Accordingly, we must remand to the trial court for a determination of which AUUW count is more serious. See *People v. Artis*, 232 Ill. 2d 156, 177 (2009) ("when it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause will be remanded to the trial court for that determination.")

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, and remand the cause for a determination of which AUUW count is more serious, and resentencing based on that determination.

¶ 44 Judgment affirmed; cause remanded for resentencing with directions.