

No. 1-16-3165

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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<i>In re</i> GERARDO M., a minor,	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois	)	Cook County.
	)	
Petitioner-Appellee,	)	
	)	No. 16 JD 00587
v.	)	
	)	
Gerardo M.,	)	
	)	Honorable
Respondent-Appellant.)	)	Stuart Lubin,
	)	Judge Presiding.

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JUSTICE McBRIDE delivered the judgment of the court.  
Presiding Justice Ellis and Justice Howse concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court's finding that respondent violated his probation was not against the manifest weight of the evidence where the State proved respondent's possession of a firearm by preponderance of the evidence.
- ¶ 2 In March 2016, respondent Gerardo M. entered a plea to one count of delinquency based on aggravated unlawful use of a weapon. He was subsequently sentenced in April 2016 to 18 months of probation. In October 2016, the State filed a petition alleging a violation of probation

based on a new offense of aggravated unlawful use of a weapon that occurred on October 2, 2016. Following a revocation hearing, the juvenile court found him in violation of probation and extended his term of probation by one year, including an order to participate in intensive probation services. Respondent appeals, arguing that the State failed to prove that he knowingly possessed a gun by a preponderance of the evidence.

¶ 3 At the November 2016 revocation hearing, the following evidence was presented.

¶ 4 Sergeant Morales testified that he was employed as a Chicago police sergeant. On October 2, 2016, he was working alone in uniform in a marked vehicle. While on patrol in the evening around 10:30 p.m., he received a call related to the area of 3015 North Spaulding in Chicago. He proceeded to the alley at that location and observed a group of male Hispanics that “were pushing and shoving each other.” Sergeant Morales identified respondent as one of the males present. He turned on his vehicle’s spot light. He observed respondent from approximately 30 to 40 feet away. He stated that respondent “grabbed his right side, clutching his waist area, and [began] to flee into the yard at that location.”

¶ 5 Sergeant Morales testified that based on his experience, respondent grabbing his waistband indicated to him that “the offender [was] armed with an illegal firearm.” Respondent fled into the yard at about 3015 North Spaulding, and another individual fled in the same direction. He lost sight of respondent as he fled, and saw him later when he was detained by other officers in the yard.

¶ 6 After respondent was detained, Sergeant Morales used his flashlight to look in the vicinity of a large bush inside the yard where respondent was observed. He observed a small caliber handgun at the base of the bush. He alerted the other officers who were near the bush in the yard.

¶ 7 On cross-examination, Sergeant Morales stated that he believed six individuals were in the alley when he arrived at the location. He agreed that at least two individuals were holding their waistbands when they fled into the yard. A second individual was detained by officers after he jumped over the fence onto the sidewalk. Sergeant Morales said he suspected the second individual of possessing a weapon as well. When asked if young men hold their waistbands because their pants are too loose, Sergeant Morales responded, "At times, yes." He admitted that he did not see a handgun in respondent's hand, nor did he see respondent discard the weapon. He stated that he was present when respondent walked toward the officers from near the bush in the yard. He estimated respondent was 20 feet away from the sergeant at this point. Sergeant Morales said he was situated on the other side of the fence on the sidewalk and watched respondent walk away from the sergeant, toward other officers. Sergeant Morales stated that, to his knowledge, no fingerprint analysis was done on the firearm. During Sergeant Morales's cross-examination, respondent presented the body cam footage from Officer Carvajal, who was standing next to Sergeant Morales on the sidewalk looking into the yard as respondent was seen walking toward other officers.

¶ 8 Officer Lara testified that on October 2, 2016, he was assigned with Officer Khan. They were in plain clothes and using an unmarked vehicle. Officer Lara was in the passenger seat while Officer Khan was driving. He stated that they were called to 3015 North Spaulding as backup at around 11:45 p.m. He said they initially drove by the alley, but continued driving onto Spaulding. As Officer Khan was driving, he pointed out an individual hiding. Officer Lara exited the vehicle and detained the individual around 3019 North Spaulding. He stopped that individual (not respondent) on the sidewalk. He estimated that this occurred within seconds after they passed the sergeant in the alley.

¶ 9 Officer Lara stated that they relocated to the yard at 3015 North Spaulding. He was wearing a body cam in his vest, near his heart that day. Officer Lara's body cam footage video was played at the hearing. During the viewing of the video, Officer Lara identified respondent in court as the individual in the video. He testified that he observed respondent walk out from a bush. Officer Lara was facing that direction when respondent approached the officers. Sergeant Morales was on the other side of the fence on Spaulding. Officer Lara ordered respondent to put his hands up, and respondent complied. Officer Lara was present when Officer Khan recovered a firearm under the bush near where respondent came out. He did not see anyone else in the yard. He did not see the second individual in the yard.

¶ 10 On cross-examination, Officer Lara admitted that he did not see a weapon in respondent's hand, nor did he see respondent discard the weapon. Officer Lara stated that he was looking in another direction, and when he turned around, he saw respondent coming from the bush towards him. Officer Lara testified that respondent was "really close" to the bush.

¶ 11 Officer Khan also testified that on October 2, 2016, he was driving while on patrol with Officer Lara, and they were called to the area around 3015 North Spaulding. On Spaulding, he observed an individual jumping the fence onto the sidewalk in front of 3015 North Spaulding. He pointed that individual out to his partner, and Officer Lara exited the vehicle and detained the individual. Officer Khan identified a photograph of the yard and pointed to where the individual jumped over the fence. The record indicated that based on the photograph from the sidewalk looking at the yard, the location was the far right side of the yard, on the opposite side of the yard from the bush. He estimated that this individual was about five to six feet away from the bush when the officer observed him on the fence. He also exited his vehicle and entered the yard at 3015 North Spaulding.

¶ 12 He was also wearing a body cam in his vest and the footage was played at the hearing. During the viewing of the video, Officer Khan identified respondent in court as the person observed in the yard. Officer Khan stated that respondent came toward them from near the bush. The officer then walked near the bush and observed a firearm at the base of the bush. He put on gloves and recovered the firearm. He testified that he recovered a Cal Tech 380 semi automatic handgun loaded with five live rounds. He cleared the weapon for safety and turned it over to another officer to be inventoried. Officer Khan subsequently learned that respondent was 17 years old and did not possess a Firearm Owner Identification (FOID) Card.

¶ 13 On cross-examination, Officer Khan stated that when he observed respondent, he was approximately 15 to 20 feet away from respondent. He admitted that he never saw respondent with a gun or saw him throw a gun. On redirect, Officer Khan stated that he did not see the second individual who climbed the fence throw a gun or have anything in his hands.

¶ 14 Following this testimony, the State rested.

¶ 15 Respondent testified on his own behalf. Respondent stated that he was 17 years old. On October 2, 2016, at approximately 11:45 p.m., he was in the alley between Spaulding and Sawyer with several friends and two additional individuals he did not know. He said there were seven or eight individual in addition to himself.

¶ 16 Respondent stated that when he saw the squad car, he fled and hopped over a fence into a yard. He said he fled because he was on probation and it was past his curfew. He denied holding his waistband. He testified that two other individuals fled over the fence. He knew one, but not the other individual. He said the individual he knew ran toward the front of the house. The unknown individual also ran ahead of him. Respondent stated that he hid in the yard behind a little wall with stairs, which was lower than the sidewalk. He stayed in that location for a little

while as he saw the flashing lights. When the lights stopped flashing, he peeked out, but saw officers on the sidewalk and remained hidden.

¶ 17 Respondent testified that he came out from where he was hiding and the officers' flashlights were on him. He was told to put his hands up, which he did. He denied being near the bush in the yard. Respondent also denied throwing a gun under the bush or having a gun that night. He estimated that he was 15 to 20 feet from the bush when he came out.

¶ 18 Respondent rested after his testimony. Following arguments, the court found that the State had proven the violation of probation by a preponderance of the evidence. The court subsequently extended respondent's probation by one year and ordered him to participate in intensive probation services.

¶ 19 This appeal followed.

¶ 20 On appeal, respondent argues that the State failed to prove that he knowingly possessed a firearm by a preponderance of the evidence. The State maintains that when viewing the evidence in the light most favorable to the State, a rational trier of fact could find that the State proved respondent's probation violation by a preponderance of the evidence.

¶ 21 "At a probation revocation hearing, the State has the burden of going forward with the evidence and proving the violation of probation by a preponderance of the evidence while using only competent evidence." *In re N.W.*, 293 Ill. App. 3d 794, 799 (1997); see also 730 ILCS 5/5-6-4(c) (West 2014). "A proposition is proved by a preponderance of the evidence when the proposition is more probably true than not true." *People v. Love*, 404 Ill. App. 3d 784, 787 (2010). "In evaluating whether the State met its burden, the trial judge is free to resolve inconsistencies in the testimony and to accept or reject as much of each witness's testimony as the judge pleases." *Id.* "Because the trial judge is in a superior position to weigh the evidence

and decide on the credibility of the witnesses, we may not reverse the judgment merely because we might have reached a different conclusion.” *Id.* A trial court's ruling on a petition to revoke probation will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Id.* (citing *People v. Colon*, 225 Ill. 2d 125, 158 (2007)). “A finding is against the manifest weight of the evidence only if the opposite result is clearly evident.” *Id.* “Thus, even where the State's evidence is slight, we must affirm the revocation of a defendant's probation as long as the opposite conclusion is not clearly evident.” *Id.*

¶ 22 Here, respondent challenges whether the State sufficiently proved that he knowingly possessed the firearm. Specifically, respondent asserts that the evidence was insufficient because none of the officers saw the firearm in his possession or saw him discard it, no physical evidence connected the firearm to respondent, and other people fled through the yard and had the opportunity to discard it.

¶ 23 Possession of a weapon can be either actual or constructive. *People v. Alicea*, 2013 IL App (1st) 112602, ¶ 24. Actual possession is proved by testimony which shows that the defendant exercised some form of dominion over the weapon, such as trying to conceal it or throwing it away. *Love*, 404 Ill. App. 3d at 787. In contrast, constructive possession arises when the defendant has the intent and capability to maintain control and dominion over the weapon. *Id.*

¶ 24 When, as in this case, respondent was not found in actual possession, the State must prove constructive possession, *i.e.*, that respondent had knowledge of the presence of the weapon and that he had immediate and exclusive control over the area where it was found. *People v. Hunter*, 2013 IL 114100, ¶ 19; *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. “Evidence of constructive possession is ‘often entirely circumstantial.’ ” *People v. Alicea*, 2013 IL App (1st) 112602, ¶ 24 (quoting *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002)). “In a case based

on circumstantial evidence, each link in the chain of circumstances does not need to be proved by a preponderance of the evidence if all the evidence considered collectively satisfies the trier of fact by a preponderance of the evidence that the defendant is guilty.” *Love*, 404 Ill. App. 3d at 787. Further, evidence of flight is admissible as tending to demonstrate a defendant's consciousness of guilt. *Spencer*, 2012 IL App (1st) 102094, ¶ 18 (citing *People v. Harris*, 52 Ill. 2d 558, 561 (1972)).

¶ 25 We find that the evidence, when viewed in the light most favorable to the State, established by a preponderance of the evidence that respondent possessed a firearm. The evidence showed that respondent was with a group of males in the alley behind 3015 North Spaulding. When Sergeant Morales arrived in the squad car and turned on his spotlight, defendant and others fled over a chain-link fence. As respondent fled, Sergeant Morales saw respondent grab his waistband, which based on his experience, suggested to the sergeant the presence of a firearm. Respondent ran into the yard of 3015 North Spaulding and hid as additional officers arrived. One individual also ran through the yard and climbed a wrought iron fence next to the sidewalk and was seen by Officer Khan and detained by Officer Lara. Officer Khan testified that this individual was at the far right of the yard when facing the yard from the sidewalk on Spaulding, which was approximately five to six feet from the large bush in the yard. We point out that the fences around the yard did not block visibility to activities in the yard. The video footage from the body cams showed that a wrought iron fence lined the sidewalk and the back of the yard was enclosed by a chain-link fence.

¶ 26 All of the police officers testified that respondent was seen walking toward Officers Khan and Lara near the bush in the yard. After respondent was detained, a firearm was found and subsequently recovered by Officer Khan.



¶ 27 In contrast, respondent testified that he ran because he was out after curfew for his probation. He denied grabbing his waistband as he fled. He stated that two other individuals fled through the yard, though only one was detained immediately after climbing the fence.

Respondent said he hid by a door with stairs going down and when he approached the officers, he was 15 to 20 feet from the bush. He denied possessing the firearm at any time.

¶ 28 Officers Khan and Lara had body cams recording while at the scene, which was admitted at the hearing. We note that the body cam video footage from the three officers was included in the record on appeal and was viewed by this court. The video footage corroborates the officers' testimony about the events and respondent's position in the yard. The video does not support respondent's testimony that he was 15 to 20 feet from the bush when he began to approach the officers. Officer Carvajal's body cam, admitted as an exhibit for respondent, does not contradict the State's evidence. Rather, from the position of that officer and Sergeant Morales, respondent was seen walking from the other side of the bush away from the officers, respondent was not visible from this angle until he was away from the bush and already visible to Officer Lara. This video also corroborates Sergeant Morales's testimony that he observed the firearm under the bush and called to the officers in the yard to recover it. The firearm was on the side of the bush where respondent was seen walking toward Officer Lara.

¶ 29 Respondent relies on the decision in *People v. Wright*, 2013 IL App (1st) 111803, to support his argument that the evidence failed to establish constructive possession. In *Wright*, the police went to a residence to execute a search warrant. As they entered the house, the defendant and a second individual fled down the basement stairs. The men fell. When they landed, one firearm was found near the second individual's hands and a second firearm was found underneath the defendant. The defendant was charged with aggravated unlawful use of a weapon

for the second firearm. *Id.* ¶¶ 5-12. On appeal, the reviewing court reversed the defendant's conviction, finding that the State failed to prove that the defendant "knowingly possessed the gun that was attributed to him." *Id.* ¶ 26. The court pointed out that none of the State's three witnesses saw the defendant with the gun or make any movement to discard the gun, nor was there any physical evidence connecting the gun to the defendant. Two of the witnesses testified that the gun was found underneath the defendant, but neither stated that the defendant "made any movements to indicate knowledge of a weapon." The court further noted that three additional individuals were present in the basement at the time. *Id.*

¶ 30 We find *Wright* to be distinguishable from the instant case. Significantly, we observe that the burden of proof in *Wright* was the much greater standard of reasonable doubt, whereas here, the State needed to prove possession by a preponderance of the evidence, that it was more likely than not. Further, in *Wright*, at least five individuals were in the vicinity of where the firearm was recovered. Here, the police observed two individuals. The second individual was seen jumping over the fence in the yard, five to six feet away from the bush, while respondent was seen by the officers in close proximity to the bush, which was supported by the body cam footage. The firearm was recovered from under the bush immediately after respondent was detained. Respondent's testimony that he was 15 to 20 feet from the bush was contradicted by the officers' testimony as well as the video footage. Further, Sergeant Morales observed respondent grab his waistband as he fled, a gesture that indicated possession of a firearm.

¶ 31 In finding a violation of probation, the trial court made the following findings.

“Sergeant Morales testified that he got a call. He proceeded to 3015 North Spaulding, Spaulding and Wellington. He was in the alley. [Respondent] was in the alley. There were a group [*sic*] of

male Hispanics pushing and shoving each other. He used his car's spotlight. He was 30 to 40 feet away from [respondent]. He said that [respondent] grabbed his right side, clutched his waist area and fled.

He said another person also fled with [respondent]. He lost sight of [respondent] and saw him again in custody in the yard from the sidewalk. He said [respondent] was walking away from a bush, a large bush, which is where the gun was found.

Officer Lara testified that he and his partner Khan were in the area at about 11:49 responding to an assistance of Sergeant Morales. He took [the second individual] into custody who had been hiding. He testified that [the second individual] was never in the yard. But, Officer Khan also said he didn't see him in the yard either, he just saw him jumping the fence. I saw Officer Lara's body cam, \*\*\* and I clearly saw [respondent] emerging from within a foot of the bush where the gun was recovered from.

Officer Khan testified that they were looking for the two people who had fled that night October 2nd. He saw one person jumping a fence. He only saw him jumping the fence. He didn't see him in the yard. He said he jumped, but the other person \*\*\* jumped to the far right side of the fence, further away from the bush. His body cam \*\*\* corroborates Officer Lara's body cam.

[Respondent] testified that he ran [be]cause he was violating curfew. He never held his waistband, which I don't believe; that [the second individual] and he and another person he didn't know ran. He first said he hid behind a wall under some stairs for ten or 15 minutes, then went to a spot. He said he was never near the bush, which is contradicted frankly by the two body cam videos, [Officer Lara's body cam] specifically contradicts the [respondent's] testimony and is pretty clear as to where the defendant was. He obviously was near the bush. No one else was near the bush that night. There's no evidence that anybody else was near the bush. It's very strong circumstantial evidence that ties [respondent] to this gun, sufficient to prove the violation by a preponderance of the evidence."

¶ 32 As the trial court found, the evidence presented was sufficient to establish respondent's possession by a preponderance of the evidence. Accordingly, we conclude the trial court's finding that respondent violated his probation was not against the manifest weight of the evidence.

¶ 33 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 34 Affirmed.