2017 IL App (2d) 150315-U
No. 2-15-0315
Order filed April 11, 2017
Modified upon denial of rehearing May 12, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-2383
RAMON R. PICKENS,	)	Honorable Susan Clancy Boles,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was properly convicted of armed violence, as he was carrying a handgun when he delivered cocaine; it was irrelevant that the handgun was unloaded and that defendant divested himself of it before he was arrested.

¶ 2 After defendant, Ramon R. Pickens, pleaded guilty to eight counts of a 10-count indictment, the trial court entered convictions on a single count of unlawful delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2012)) and two counts of unlawful delivery of a controlled substance within 1000 feet of a park (720 ILCS 570/407(b)(1), (b)(2) (West 2012)). The court found that several other counts of the indictment merged with those three

counts. In addition, following a stipulated bench trial, defendant was found guilty of armed violence (720 ILCS 5/33A-2(a) (West 2012)) on the basis that he committed the predicate offense of unlawful delivery of a controlled substance within 1000 feet of a park while armed with a handgun. Defendant appeals from the armed violence conviction. He contends that his brief possession of an unloaded handgun that he received as payment for drugs did not constitute being "armed with a dangerous weapon." *Id.* We affirm.

¶ 3 At trial, the parties stipulated that, on November 15, 2012, Detective Craig Tucker of the Elgin police department, who was working undercover, engaged in a drug transaction with defendant. Afterward, defendant indicated that he wanted to obtain a gun. Tucker agreed to trade a gun for cocaine. On November 26, 2012, defendant and Tucker met at a gas station in Elgin. Defendant got into the passenger seat of Tucker's vehicle. Tucker gave defendant a shopping bag containing a handgun. Defendant inspected the gun, removed its magazine, and put the gun back in the bag. The gun was unloaded and there was no ammunition at the scene. Defendant handed cocaine to Tucker, who then activated an arrest signal. Defendant put the gun into his sleeve and started to leave Tucker's vehicle. A tactical team approached and defendant threw the gun into the rear of Tucker's vehicle. Defendant was then taken into custody.

¶ 4 Pursuant to section 33A-2(a) of the Criminal Code of 2012 (720 ILCS 5/33A-2(a) (West 2012)), a person commits armed violence when "while armed with a dangerous weapon" he or she commits any felony (other than various specifically enumerated offenses or "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range"). For purposes of the armed violence statute, "[a] person is considered armed with a dangerous weapon *** when he or she carries on or about his person or is

otherwise armed with a Category I *** weapon." 720 ILCS 5/33A-1(c)(1) (West 2012). There is no dispute that the handgun that defendant received from Tucker was a Category I weapon. In addition, defendant concedes that, when he delivered drugs to Tucker, he possessed the handgun "in a literal sense." Nonetheless defendant argues, in essence, that because his possession of the handgun did not create the kind of danger the armed violence statute was designed to address, he was not "armed with a dangerous weapon" within the meaning of statute. 720 ILCS 5/33A-2(a) (West 2012).

¶ 5 Defendant's argument raises a question of statutory construction. The following general principles guide our inquiry:

> "The fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent. [Citation.] The best indication of legislative intent is the statutory language, given its plain and ordinary meaning. [Citation.] Where the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction. [Citation.] If the statutory language is ambiguous, however, we may look to other sources to ascertain the legislature's intent. [Citation.] The construction of a statute is a question of law that is reviewed *de novo*. [Citation.]" *Krohe v. City of Bloomington*, 204 Ill. 2d 392, 394-95 (2003).

We note that the armed violence statute includes the express legislative finding that "[t]he use of a dangerous weapon in the commission of a felony offense poses a much greater threat to the public health, safety, and general welfare, than when a weapon is not used in the commission of the offense." 720 ILCS 5/33A-1(a)(1) (West 2012). However, such findings generally are not considered to be operative parts of statutory enactments (*Illinois Independent Telephone Ass'n v. Illinois Commerce Comm'n*, 183 Ill. App. 3d 220, 236 (1988)) and may not be used to create

ambiguity in otherwise unambiguous statutory language (*People v. McCarty*, 223 Ill. 2d 109, 128 (2006)).

¶ 6 Citing *People v. Smith*, 191 Ill. 2d 408 (2000), defendant argues that, because he "divested himself of the handgun, which was not even loaded, prior to being arrested," he is not guilty of armed violence. In *Smith*, our supreme court reversed an armed violence conviction that was based on evidence that the defendant dropped an unloaded handgun out of an apartment window as police approached to execute a search warrant and that cocaine and cannabis were discovered in the apartment. The court drew from its earlier decisions in *People v. Condon*, 148 Ill. 2d 96 (1992), and *People v. Harre*, 155 Ill. 2d 392 (1993). In *Condon*, our supreme court concluded that the discovery of weapons in the premises where the defendant was found to be in possession of cocaine that was packaged for sale did not support a finding that the defendant was "otherwise armed" with the weapons during the commission of a felony. The court reasoned as follows:

> "A felon with a weapon at his or her disposal is forced to make a spontaneous and often instantaneous decision to kill without time to reflect on the use of such deadly force. [Citation.] Without a weapon at hand, the felon is not faced with such a deadly decision. Hence, we have the deterrent purpose of the armed violence statute. Thus, for this purpose to be served, it would be necessary that the defendant have some type of *immediate access to* or *timely control over* the weapon." (Emphases in original.) *Condon*, 148 Ill. 2d at 109-10.

In *Harre*, however, our supreme court upheld the defendant's armed violence conviction where the police observed the defendant riding on the hood of a motor vehicle; a key found in the defendant's pocket opened the vehicle's trunk, in which police found garbage bags filled with

cannabis; and a handgun and rifle on the front seat of the vehicle was within the defendant's reach when the police initially confronted him. The court stressed that, unlike in *Condon*, "the evidence supported the jury's finding that defendant had immediate access to and control over the weapons during the course of the underlying felony." *Harre*, 155 Ill. 2d at 400.

¶ 7 The *Smith* court reasoned that, because the defendant dropped a weapon out of a window as police were approaching, he lacked either immediate access to or timely control of that weapon when the police entered the apartment to execute the search warrant. The court concluded that permitting an armed violence conviction to stand under those circumstances would frustrate the armed violence statute's purpose of "deterring criminals from involving themselves and others in potentially deadly situations." *Smith*, 191 Ill. 2d at 413.

¶ 8 Whereas the reasoning in *Smith* is based on the court's prior analyses—in *Condon* and *Harre*—of when a felon is "otherwise armed" with a dangerous weapon, we need not consider that question here. Regardless of whether defendant was "otherwise armed" *after* he threw the handgun into the back of the Tucker's vehicle, he was unquestionably armed when he first received the gun from Tucker, examined it, and then placed it in his sleeve. It cannot be gainsaid that, throughout that period, defendant was carrying the gun either on or about his person and was thus "armed with a dangerous weapon" according to the statutory definition. 720 ILCS 5/33A-2(a) (West 2012). It was during this period that defendant committed the offense of unlawful delivery of a controlled substance. Because defendant committed a felony while armed with a dangerous weapon, he was guilty of armed violence regardless of whether he thereafter "divested" himself of the weapon before being arrested. *Harre*, 155 Ill. 2d at 401. Moreover, according to the plain language of the armed violence statute, even an unloaded handgun qualifies as a dangerous weapon. *People v. Orsby*, 286 Ill. App. 3d 142, 149-50 (1996). Indeed,

in *People v. Anderson*, 364 Ill. App. 3d 528 (2006), we upheld an armed violence conviction even though the defendant evidently lacked immediate access to ammunition for the weapon he had been carrying.

¶ 9 Defendant argues that, unlike in *Anderson*, there was no danger here that the unloaded weapon, supplied by police as part of an undercover operation, would provoke a violent response. Defendant argues that, absent that danger, he should not be subject to an armed violence conviction. But it is the very nature of undercover operations that planning by law enforcement will ameliorate the harm ordinarily attendant to the targeted criminal behavior. Thus, although undercover drug purchases are presumably structured so that the purchased drugs will not cause the harm that the drug laws were designed to guard against, that is no defense for a drug dealer who unwittingly sells drugs to an undercover officer.

¶ 10 We note that law enforcement's role in planning an undercover operation may be relevant to a defendant's guilt or innocence to the extent that the defense of entrapment is at issue. It is abundantly clear, however, that that defense would not be available here. "[A] defendant invoking an entrapment defense must present evidence that (1) the State induced or incited him to commit the crimes and (2) he lacked the predisposition to commit the crimes." *People v. Anderson*, 2013 IL App (2d) 111183, ¶ 60. Here, defendant introduced the idea of obtaining a handgun from the undercover officer. After learning that the weapon he was to receive from the officer was stolen in a burglary, defendant agreed to trade cocaine for the weapon. Defendant thus exhibited a predisposition to bring a dangerous weapon into the situation.

¶ 11 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for

this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 12 Affirmed.