2018 IL App (1st) 173179-U

FOURTH DIVISION
December 4, 2018

No. 1-17-3179

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MALACHI M., a minor	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Cook County
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 16 JD 60265
	)	
Malachi M.,	)	
	)	
	)	Honorable
Respondent-Appellant).	)	Donna L. Cooper,
	)	Judge Presiding.
	)	
	)	

JUSTICE REYES delivered the judgment of the court.
Justice Burke concurred in the judgment.
Justice Gordon concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Affirming in part and reversing in part the judgment of the circuit court of Cook County where (1) the trial court did not err in denying the motion to suppress, (2) the evidence was sufficient to adjudicate the respondent delinquent beyond a reasonable doubt, (3) the probation order must be corrected to reflect the oral

pronouncement of the trial court, and (4) the probation condition that respondent have "no gang contact or activity" was unconstitutional.

¶ 2 Following a bench trial, respondent Malachi M., a 15-year old minor, was found guilty of one count of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1)(3)(C) (West 2016)) and adjudicated a delinquent minor pursuant to the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5 *et seq.* (West 2016)). Respondent was sentenced to a two-year term of probation with various conditions. On appeal, respondent contends: (1) his fourth amendment rights were violated where the police stopped him without any reasonable suspicion of criminal behavior; (2) the State failed to prove he was guilty of AUUW where the evidence established that he was an invitee and thereby exempt from the reach of the statute; (3) his written probation order did not reflect the oral pronouncement of the trial court regarding his term of probation and should be corrected to so reflect; and (4) the circuit court's probation order prohibiting any contact or activity with gangs is unconstitutionally overbroad. For the reasons that follow, we affirm respondent's adjudication of delinquency but hold the probation condition prohibiting respondent from associating with gang members is unconstitutionally overbroad and further amend the probation order to properly reflect the oral pronouncement of the trial court.

¶ 3 BACKGROUND

¶ 4 On October 11, 2016, the State filed a petition for the adjudication of wardship of 15-year-old Malachi M., alleging that, on October 9, 2016, he committed one count of AUUW without a valid firearm owners identification (FOID) card, one count of AUUW while under the age of 21, and one count of unlawful possession of a firearm concealed upon his person while under the age of 18.

¶ 5 Prior to trial, respondent filed a motion to quash his arrest and suppress evidence. In his motion, respondent argued that the officer lacked reasonable articulable suspicion to justify

stopping respondent. At the suppression hearing Officer Brian Walker of the Markham Police Department testified that he was on duty on October 9, 2016, at 12 p.m. when he received a 911 dispatch that there were two African-American males walking westward on Sherwood and one of those individuals was carrying a handgun. The 911 caller, who did not identify him or herself, described the individual with the firearm as wearing all gray and a backwards gray baseball hat. Upon reaching the corner of Sherwood and Richmond, Officer Walker observed four African-American males standing in the driveway of a residence located on the 2900 block of Sherwood. At that location, the 18-foot driveway led up to an open two-car garage door with a six-foot long couch inside. One of the individuals in the driveway matched the description of the individual provided to Officer Walker, who later in court identified this individual as respondent. Officer Walker curbed his police vehicle in front of the driveway, exited the vehicle, and requested the four individuals step over to the curb. All but respondent followed Officer Walker's directions. Instead, respondent "slowly started walking toward the garage" and stood behind the couch. Officer Walker again requested respondent step to the curb and respondent replied, "Who me?" Officer Walker responded, "Yes, you." At this time, Officer Walker observed respondent bend over behind the couch and make "furtive movements." After demonstrating these movements to the court, the trial court described them as "pulling out his hands from his waist, up and down kind of bouncing his shoulders, indicating an up and down movement." Officer Walker ordered respondent to "stop bending over," but according to Officer Walker, these furtive movements continued. Based on his 14-years of experience as a police officer, the information from the 911 call, respondent's continued refusal to cooperate, and respondent's furtive movements behind the couch, Officer Walker testified he believed that respondent was "[s]tuffing a gun underneath the couch."

¶ 6 Fearing for his safety, Officer Walker then removed his weapon and stated "stop bending over, step from behind the couch or you will be shot." Respondent then complied with Officer Walker's orders. Respondent was placed in handcuffs and a protective pat-down of respondent and the three other individuals revealed no weapon. Immediately thereafter Officer Walker looked behind the couch in the garage where respondent had been standing and he noticed the handle of a weapon poking out from underneath the couch and recovered a loaded .380 Bryco handgun. According to Officer Walker, only "[a] minute or two" passed between respondent coming out from behind the couch and when he discovered the weapon. Respondent was then placed into custody and taken to the police station to be questioned. Officer Walker further testified that one of the other three individuals in the driveway resided at the home. No other testimony or evidence was presented.

¶ 7 The trial court denied the motion to quash and suppress evidence finding Officer Walker's testimony to be "very credible" and that the officer had a reasonable articulable suspicion to detain respondent. Specifically, the trial court found that the information possessed by Officer Walker via the 911 call, coupled with respondent's noncompliance with his orders and furtive movements behind the couch provided Officer Walker with a reasonable articulable suspicion that respondent placed a firearm behind the couch. Defense counsel then filed two motions to reconsider this ruling, which were denied.

¶ 8 The matter proceeded to a stipulated bench trial. The parties stipulated to the suppression hearing testimony of Officer Walker and additional testimony from Officer Walker regarding respondent's statement upon being questioned in the presence of his mother at the police station. According to Officer Walker's stipulated testimony, respondent informed him that he found the firearm at Canterbury Mall behind a dumpster, under some trash. Respondent relayed that he

knew it was wrong to keep the weapon and that he should have turned it over to the police or his parents, but failed to do so. Officer Walker's stipulated testimony also included respondent's date of birth, July 2001, and that he was not in possession of a FOID card and was not engaged in any lawful activities under the Wildlife Code at the time of this incident. The parties further stipulated that respondent did not reside at the location where he was arrested.

¶ 9 After hearing arguments, the trial court found respondent guilty of count one, AUUW with no valid FOID card, and adjudicated him delinquent. The trial court made no findings as to the other two remaining counts.[1] The matter proceeded to a dispositional hearing. The trial court reviewed a social investigation report prepared by respondent's probation officer. Among other items, the report reflected that respondent had one prior referral to the juvenile court. Pertinent to this appeal, the report indicated that respondent denied any gang affiliation. Respondent also reported to his probation officer that he has a total of ten friends and that two of those friends are gang affiliated. The report further indicated that over the past year, respondent's drug use had escalated and was causing issues with his attendance and performance at school. The probation officer recommended that respondent be placed on 18 months' probation, serve 30 hours of community service, and be assessed for drug treatment.

¶ 10 At the dispositional hearing, the State requested a longer period of probation than recommended by the probation officer and that respondent participate in an inpatient drug treatment program. In response to the State's recommendation, respondent requested 12 months of probation and indicated he was willing to participate in outpatient drug treatment.

¶ 11 After hearing arguments, the trial court sentenced respondent to two years' probation, with the possibility of early termination after 18 months if all the terms and conditions of his

[1] The record discloses only that the trial court adjudicated respondent delinquent on the AUUW count, there is nothing in the record regarding the disposition of the remaining two counts.

probation were met. Respondent was further ordered to complete 25 hours of community service, not to possess any illegal firearms or drugs, not to engage in any dangerous activities, attend school, and be evaluated for potential inpatient or outpatient drug treatment. While the trial court did not indicate that there would be a prohibition against respondent associating with gangs in its verbal remarks, the written order provided that respondent was to have "no gang contact or activity." The written order further indicated, contrary to the trial court's oral pronouncement, that respondent was sentenced to two-and-a-half years' probation. This appeal followed.

¶ 12 ANALYSIS

¶ 13 At the outset we observe that the State agrees with respondent that the trial court ordered a two-year term of probation, not the two-and-a-half year term reflected in the written orders. Our review of the record reveals the same. Accordingly, the dispositional and probation orders should be amended to reflect the trial court's oral pronouncement of a two-year term of probation. See *People v. Roberson*, 401 Ill. App. 3d 758, 744 (2010). We now turn to consider respondent's contentions regarding the trial court's ruling on the motion to quash arrest and suppress evidence, the sufficiency of the evidence, and the probation conditions imposed by the court.

¶ 14 Motion to Quash

¶ 15 Respondent contends that the trial court denied his motion to quash in error where the evidence established that he was arrested without probable cause. Respondent maintains he was arrested based solely on an anonymous tip that there was an individual carrying a handgun, which is not *per se* illegal, and some purportedly furtive movements viewed by Officer Walker. According to respondent, he was seized for fourth amendment purposes when he submitted to

Officer Walker's order to lie face down on the driveway and was handcuffed. In the alternative, respondent asserts that Officer Walker lacked reasonable articulable suspicion that respondent was involved in criminal activity based on the totality of the circumstances. Respondent maintains, based on his illegal seizure, that the loaded handgun, which was discovered shortly after he was handcuffed, should have been suppressed.

¶ 16 A reviewing court accords great deference to the factual findings of the trial court, which will be reversed only if they are against the manifest weight of the evidence, but reviews *de novo* the trial court's ultimate determination to grant or deny the defendant's motion to suppress. *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). On such a motion the defendant bears the burden of proof that the search and seizure were unlawful. *People v. Gipson*, 203 Ill. 2d 298, 306 (2003).

¶ 17 The fourth amendment to the United States Constitution guarantees the right of the people to be secure against unreasonable searches and seizures. U.S. Const., amend. IV. "Reasonableness under the fourth amendment generally requires a warrant supported by probable cause" (*People v. Johnson*, 237 Ill. 2d 81, 89 (2010)), but the Supreme Court in *Terry v. Ohio*, 392 U.S. 1 (1968), recognized an exception to the warrant requirement. Pursuant to *Terry*, "an officer may, within the parameters of the fourth amendment, conduct a brief, investigatory stop of a citizen when the officer has a reasonable, articulable suspicion of criminal activity, and such suspicion amounts to more than a mere 'hunch.' " *People v. Gherna*, 203 Ill. 2d 165, 177 (2003) (citing *Terry*, 392 U.S. at 27).

¶ 18 Not every encounter between the police and a private citizen results in a seizure. *Luedemann*, 222 Ill. 2d at 544. "Courts have divided police-citizen encounters into three tiers: (1) arrests, which must be supported by probable cause; (2) brief investigative detentions, or

'*Terry* stops,' which must be supported by a reasonable, articulable suspicion of criminal activity; and (3) [consensual] encounters that involve no coercion or detention and thus do not implicate fourth amendment interests." *Id.*

¶ 19 The police have the right to approach citizens and ask potentially incriminating questions, and an officer does not violate the fourth amendment merely by approaching a person in public to ask questions if the person is willing to listen. *Id.* at 549. For example, the police may approach a person standing or seated in a public place or seated in a parked vehicle and ask questions of that person without that encounter constituting a seizure. *Id.* at 552.

¶ 20 In a consensual encounter, the issue is not whether the person feels free to leave but, rather, whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter. *Id.* at 550. Factors that may be indicative of a seizure include "(1) the threatening presence of several officers; (2) the display of a weapon by an officer; (3) some physical touching of the person of the citizen; and (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 553. In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person. *Id.*

¶ 21 Here, Officer Walker, who was properly investigating a 911 call that an individual was observed openly carrying a firearm on Sherwood Avenue, curbed his vehicle at the corner of Sherwood Avenue and Richmond Avenue after observing an individual matching the description provided in the 911 dispatch. While standing next to his police vehicle, Officer Walker requested that the four individuals standing in the driveway "step toward the curb." We find that the encounter was consensual where there was only one police officer and the credible testimony of Officer Walker established that, while he was in uniform and driving a marked police vehicle,

Officer Walker's weapon remained in its holster. See *People v. Qurash*, 2017 IL App (1st) 143412, ¶ 17 (statement from a police officer for the defendant to "come here" did not result in a seizure for fourth amendment purposes). Furthermore, the evidence established respondent himself viewed this to be a consensual encounter where, instead of complying with Officer Walker's request, respondent began walking away from Officer Walker toward the garage.

¶ 22 During this consensual encounter, however, reasonable suspicion developed, which transformed it into a lawful investigatory *Terry* stop. To justify a *Terry* stop, a police officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion." *Terry*, 392 U.S. at 21; see also 725 ILCS 5/107-14 (West 2016) (after a peace officer identifies himself, he may stop any person in a public place for a reasonable period of time when the officer reasonably infers from the circumstances that the person is committing, is about to commit or has committed an offense, and may demand the name and address of the person and an explanation of his actions). When reviewing the officer's actions, a court applies an objective standard to decide whether the facts available to the officer at the time would lead an individual of reasonable caution to believe that the actions taken were appropriate. *People v. Close*, 238 Ill. 2d 497, 505 (2010) ("Under *Terry*, a police officer may conduct a brief, investigatory stop of a person where the officer reasonably believes that the person has committed, or is about to, commit a crime."). The validity of such a stop rests upon the totality of the facts and circumstances known to the officer at the time of the stop. *People v. Adams*, 225 Ill. App. 3d 815, 818 (1992).

¶ 23 The circumstances of this case establish that a continued investigation was warranted. Specifically, Officer Walker, who was investigating a 911 call that an individual was openly carrying a weapon on Sherwood Avenue, observed respondent walk behind a couch that was in

the garage, bend over at the waist, and make furtive movements. At the suppression hearing, Officer Walker demonstrated the movements he viewed and the trial court recounted them as "pulling out his hands from his waist, up and down, kind of bouncing his shoulders, indicating an up and down movement." Officer Walker, fearing for his safety as he believed respondent was placing a firearm underneath the couch, ordered respondent to "stop bending over." Respondent did not comply with the order and Officer Walker again ordered respondent to "stop bending over, step from behind the couch or you will be shot." At this point Officer Walker determined respondent need to be detained. Using an objective standard, the facts and circumstances known to the officer warranted a person of reasonable caution to believe a stop was necessary to investigate the possibility of criminal activity. See *People v. Fields*, 2014 IL App (1st) 130209, ¶¶ 21, 24 (officers conducted a proper *Terry* stop that allowed the officers to investigate "the circumstances that provoked suspicions").

¶ 24 In reaching this conclusion, we have considered *Florida v. J.L.*, 529 U.S. 266 (2000), and *People v. Henderson*, 2013 IL 114040, upon which defendant relies to support his primary contention that Officer Walker acted solely on an anonymous tip that did not provide him with a basis for reasonable suspicion to detain him. In *J.L.*, the police received an anonymous tip via telephone that a young African-American male standing at a particular bus stop and wearing a plaid shirt was carrying a gun. *J.L.*, 529 U.S. at 268. Based on that tip, officers arrived at the specified bus stop and observed three African-American males, one of whom was wearing a plaid shirt, standing there. *Id.* Although defendant, who was in the plaid shirt, he made no threatening or otherwise unusual movements and officers did not see a firearm, "an officer instructed him to place his hands up on the bus stop [*sic*] and frisked him," seizing a gun from his pocket. *Id.* The Supreme Court held that the anonymous tip at issue, without more, was

insufficient to justify a *Terry* stop. *Id.* In doing so the court reasoned that in certain situations an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion" to make a *Terry* stop, and found that no such corroboration was present in the case before it. *J.L.*, 529 U.S. at 270-72.

¶ 25 In *Henderson*, the police officers were "flagged down" by an " 'anonymous citizen' " and informed that there was "a 'possible gun' in a tan, four-door Lincoln." *Henderson*, 2013 IL 114040, ¶ 3. Shortly after this conversation, the officers observed a tan four-door Lincoln, curbed the vehicle, and began a pat-down of the driver and passengers. *Id.* ¶¶ 3-4. When the defendant was ordered out of the vehicle the defendant " 'took off running' and 'dropped a weapon onto the ground.' " *Id.* ¶ 4. The weapon, however, was never observed in the defendant's hand. *Id.* The defendant was pursued and then arrested. *Id.* ¶ 5. The officers recovered a .22-caliber handgun loaded with four bullets two feet from the Lincoln. *Id.* On appeal, the defendant argued his counsel as ineffective for failing to file a motion to suppress the weapon where the vehicle stop was illegal and the firearm was the fruit of that illegal seizure. *Id.* ¶¶ 12, 16. Our supreme court concluded that, similar to the facts of *J.L.*, the anonymous citizen tip was insufficient to demonstrate the reliability of the information provided to the police and thus the vehicle stop was an illegal seizure of defendant. *Id.* ¶ 30.

¶ 26 Here, unlike *J.L.* and *Henderson*, the report of the crime was from a 911 caller. A call to a police emergency line does not constitute an "anonymous tip" and should not be viewed "with the skepticism applied to tips provided by confidential informants," because the caller "places his anonymity at risk." *People v. Shafer*, 372 Ill. App. 3d 1044, 1054 (2007). In *J.L.*, and unlike here, police did not have any basis aside from the allegation in the tip that he was carrying a gun, but immediately effectuated a *Terry* stop by instructing him to place "his hands up on the bus

stop [*sic*]" and frisked him. *J.L.*, 529 U.S. at 268. The officers in *Henderson* similarly stopped the vehicle solely on the allegation of an anonymous tip that a firearm was inside the Lincoln. *Henderson*, 2013 IL 114040, ¶ 3. Prior to effectuating the *Terry* stop in this case, however, Officer Walker testified, he observed respondent, who matched the description, at the same location the 911 caller had provided, and that upon viewing Officer Walker and hearing his request to step to the curb, respondent proceeded to walk in the opposite direction. As a matter of fact, the trial court found that respondent "began to back away from the officer," stood behind the sofa, and bent over. The trial court further found that Officer Walker could not see through the couch and upon observing the furtive movements gave commands for respondent to come forward which were disobeyed. The record further demonstrates that respondent's behavior upon Officer Walker's approach was suspicions. Based on Officer Walker's testimony to that effect, we find that the trial court's determination was not against the manifest weight of the evidence. See *People v. Jackson*, 2012 IL App (1st) 103300, ¶ 21. All this evidence corroborated the assertion of illegality in the tip, and this evidence distinguishes the case at bar from *J.L.* and *Henderson*.

¶ 27 Respondent further contends that the mere possession of a firearm outside the home is not inherently criminal activity in Illinois and therefore knowing that someone is in possession of a firearm is no longer the same as knowing they are committing an offense. In this case it can be inferred from the record that the 911 caller viewed respondent openly carrying a weapon on Sherwood Avenue. It is an offense to openly carry a firearm on a public street unless the firearm is "carried or possessed in accordance with the Firearm Concealed Carry Act by a person who has been issued a currently valid license under the Firearm Concealed Carry Act." See 720 ILCS 5/24-1(10)(iv) (West 2016). Thus, the 911 tip did provide the police with information about

potentially criminal activity and an investigation by the police was warranted. Moreover, when Officer Walker first approached respondent it was to conduct a field interview. Respondent was not detained at that time. Further, as previously discussed, the totality of the circumstances demonstrated that Officer Walker did not detain respondent solely based on the 911 call.

¶ 28 Having determined that a continued investigation was warranted, we must determine whether the officer's action of handcuffing defendant was justified as part of the continuing *Terry* investigation. Because *Terry* permits an officer to briefly detain an individual to investigate the possibility of criminal behavior without probable cause to arrest, the mere restraint of an individual does not turn an investigatory stop into an arrest. *People v. Young*, 306 Ill. App. 3d 350, 354 (1999). Consequently, even though a defendant is actually not free to go during the investigatory stop, the stop is not an arrest. *People v. Paskins*, 154 Ill. App. 3d 417, 422 (1987).

¶ 29 The difference between an arrest and a *Terry* stop is not the restraint on an individual's movement but, rather, depends on the length of time the person is detained and the scope of the investigation that follows the initial encounter. *Id.* "The scope of the investigation must be reasonably related to the circumstances that justified the police interference and the investigation must last no longer than is necessary to effectuate the purpose of the stop." *People v. Ross*, 317 Ill. App. 3d 26, 31 (2000). Furthermore, the mere act of handcuffing a person does not transform a *Terry* stop into an illegal arrest. *People v. Colyar*, 2013 IL 111835, ¶ 46. Rather, the propriety of handcuffing a person during a *Terry* stop depends on the circumstances of the case. *Id.* Legitimate interests in using handcuffs during a *Terry* stop include protecting law enforcement officers, the public, or the suspect from the undue risk of harm. *People v. Arnold*, 394 Ill. App. 3d 63, 72 (2009).

¶ 30 In this case, the record demonstrates that Officer Walker had information that an individual fitting respondent's description and location was carrying a handgun. After observing respondent bend over behind the couch (where respondent could not be viewed) and make furtive movements despite Officer Walker's commands to step away from the couch, it was reasonable for Officer Walker to handcuff respondent, perform a protective pat-down and to investigate further. See *In re A.V.*, 336 Ill. App. 3d 140, 144 (2002) ("The specific information that the police received was that respondent was carrying a gun. Under such circumstances, where there was a reasonable belief that a weapon was concealed, the protective pat-down search was appropriate."); see also *Arnold*, 394 Ill. App. 3d at 71 ("the safety of the police officer or the public justify handcuffing the detainee for the brief duration of an investigatory stop."). Moreover, the record establishes that respondent was detained for one to two minutes—the period of time it took for Officer Walker to walk 18 feet into the garage, look behind the couch, and discover the firearm.

¶ 31 We also find that Officer Walker had probable cause to arrest respondent once he discovered the weapon. Probable cause for an arrest exists if the facts and surrounding circumstances, considered as a whole, are sufficient to justify a belief by a reasonably cautious person that the defendant is or has been involved in a crime. *People v. Hopkins*, 235 Ill. 2d 453, 472 (2009). Probable cause can be established where the police have more than mere suspicion that the arrestee committed the crime in question. *Id.*

¶ 32 While respondent was detained, Officer Walker went into the garage and looked behind the couch where respondent had been. Officer Walker noticed the handle of a firearm protruding from under the couch. Based on the totality of the circumstances, once Officer Walker recovered the handgun he was justified in his belief that respondent unlawfully possessed the weapon.

Therefore, we find that the trial court was correct to deny respondent's motion to quash the arrest and suppress evidence when Officer Walker acted under reasonable suspicion when he conducted an initial Terry stop and then had probable cause to arrest respondent once the firearm was discovered.

¶ 33 Sufficiency of the Evidence

¶ 34 Respondent maintains that the State failed to prove him guilty of AUUW beyond a reasonable doubt where the evidence established that he was an invitee and thereby exempt from the reach of the statute. Respondent does not challenge the sufficiency of the evidence regarding the elements of the offense. In response, the State argues that respondent failed to prove he was an invitee as contemplated by the statute by a preponderance of the evidence.

¶ 35 After filing a delinquency petition, the State must prove the elements of the substantive offense charged beyond a reasonable doubt. *In re Ryan B.*, 212 Ill. 2d 226, 231 (2004). Thus, "[a] reviewing court will not overturn a trial court's delinquency finding 'unless, after viewing the evidence in the light most favorable to the State, no rational fact finder could have found the offenses proved beyond a reasonable doubt.' " *In re T.W.*, 381 Ill. App. 3d 603, 608 (2008) (quoting *In re Gino W.*, 354 Ill. App. 3d 775, 777 (2005)). The determination of the weight to be given the testimony, witnesses' credibility, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact. *People v. Austin M.*, 2012 IL 111194, ¶ 107. When considering the sufficiency of the evidence, it is not the function of the reviewing court to retry the respondent, and we will reverse a conviction only if the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the respondent's guilt. *Id.* (citing *People v. Collins*, 214 Ill. 2d 206, 217 (2005)).

¶ 36 Respondent was charged under the following AUUW statute, which provides in relevant part:

> "(a) A person commits the offense of aggravated unlawful use of a weapon when he or she knowingly:
>
> * * *
>
> (1) Carries on or about his or her person or in any vehicle or concealed on or about his or her person *except when on his or her land or in his or her abode, legal dwelling, or fixed place of business, or on the land or in the legal dwelling of another person as an invitee with that person's permission*, any pistol, revolver, stun gun or taser or other firearm; *** and
>
> (3) One of the following factors is present:
>
> * * *
>
> (C) the person possessing the firearm has not been issued a currently valid [FOID] Card[.]" (Emphasis added.) 720 ILCS 5/24-1.6(a)(1)(3)(C) (West 2016).

¶ 37 Also relevant to our analysis is section 24-2 of the Code (720 ILCS 5/24-2 (West 2016)), which lists exemptions that apply to certain provisions of the AUUW statute. When Public Act 96-742 added the invitee provision to the AUUW statute, it also added the invitee provision to the listed exemptions in section 24-2 of the Code (see 720 ILCS 5/24-2 (West 2016)). Accordingly, section 24-2(b)(5) of the Code provides, in pertinent part, that the AUUW statute does not apply to or affect:

> "(5) Carrying or possessing any pistol, revolver, stun gun or taser or other firearm *on the land or in the legal dwelling of another person as an invitee with that person's permission*." (Emphasis added.) 720 ILCS 5/24-2(b)(5) (West 2016).

However, section 24-2(h) of the Code states:

> "(h) An information or indictment based upon a violation of any subsection of this Article need not negative any exemptions contained in this Article. *The defendant shall have the burden of proving such an exemption.*" (Emphasis added.) 720 ILCS 5/24-2(h) (West 2016).

¶ 38 The plain language of sections 24-2(b)(5) and 2(h) of the Code establishes that the general assembly intended the defendant to bear the burden of proving by a preponderance of the evidence his entitlement to the invitee exemption. *Fields*, 2014 IL App (1st) 130209, ¶ 37 (citing *People v. Velez*, 336 Ill. App. 3d 261, 266 (2003) (a defendant bears the burden of proving by a preponderance of the evidence his entitlement to an exemption from criminal liability for UUW by reason of the weapon at issue being broken down in a non-functioning state or not immediately accessible)); accord *People v. Martinez*, 285 Ill. App. 3d 881, 884 (1996).

¶ 39 Respondent had the burden of proving, by a preponderance of the evidence, that he came within the invitee exemption of the AUUW statute, and we find that he did not meet that burden. While the testimony demonstrated that respondent was standing in the driveway with three other individuals including one who resided there, no evidence was presented that respondent had permission to possess a firearm on the premises. Respondent argues in his reply brief that Officer Walker's testimony that respondent was viewed by the 911 caller to have been openly displaying the weapon as he walked down Sherwood Avenue is evidence that his companions were aware he was in possession of the firearm and thus had given respondent permission to bring it onto the driveway and in the garage. Respondent, however, confuses the testimony at trial. Officer Walker testified that the 911 caller viewed respondent walking down Sherwood Avenue with one other individual. Even if we were to presume that the individual was aware of

respondent's possession of the weapon, there was no evidence presented that (1) the individual was also present in the driveway when respondent was arrested, or (2) the driveway and garage belonged to that particular individual or that it was this individual's legal dwelling. None of respondent's three companions were identified during the trial and thus there was no evidence as to which companion was the owner or legal occupier of the land where respondent was carrying the firearm. Accordingly, respondent presented no facts to indicate that he had anyone's permission to be on the premises carrying a firearm and did not meet his burden of proof that he fell within the invitee exception to the AUUW statute.

¶ 40 Probation Conditions

¶ 41 Lastly, respondent contends the probation condition imposed by the trial court prohibiting him from associating with gangs violates his first amendment right to associate with others because it offers no means by which he may obtain exemptions for legitimate purposes and is not narrowly drawn. Respondent specifically challenges the condition of his probation that he has "no gang contact or activity." Respondent does not argue the trial court abused its discretion when it imposed this restriction, but instead maintains this restriction is unconstitutional as applied to him.

¶ 42 The trial court has wide latitude in imposing probation conditions. *In re J.W.*, 204 Ill. 2d 50, 77 (2003). Indeed, the restrictions imposed by the trial court "are often a critical tool for 'protecting a juvenile *** from the downward spiral of criminal activity into which peer pressure may lead the child.' " *K.M.*, 2018 IL App (1st) 172349, ¶ 20 (quoting *Schall v. Martin*, 467 U.S. 253, 266 (1984)). The trial court's discretion, however, is "limited by constitutional safeguards and must be exercised in a reasonable manner." *J.W.*, 204 Ill. 2d at 77. A probation condition that burdens the exercise of fundamental constitutional rights, as almost all of them do, must be

narrowly drawn and must reasonably relate to the compelling State interest in reformation and rehabilitation. *Id*. at 78. A condition is overbroad and thus not narrowly drawn if it burdens a probationer's exercise of his or her constitutional rights substantially more than is necessary to achieve its rehabilitative goal. *K.M.*, 2018 IL App (1st) 172349, ¶ 22. We find the condition here prohibiting respondent from associating with gang members was not narrowly drawn and substantially burdens respondent's constitutional rights.

¶ 43 To this end, we find the case of *In re Omar F.*, 2017 IL App (1st) 171073, to be instructive. In that case, the respondent was ordered to " 'stay away' " from and have " 'no contact' " with gangs. *Id*. ¶ 63. Although the court in *Omar F.* did not invalidate no-gang-contact restrictions in general, it found that the condition imposed on the respondent in that case was overbroad and not narrowly tailored. *Id*. ¶¶ 61, 63. The blanket no-contact restriction in that case failed to differentiate between lawful and unlawful contact with gang members. *Id*. ¶ 63. As a result, it prohibited even "innocuous" or incidental contact that the respondent would have been hard-pressed to avoid in a gang-infested neighborhood. *Id*. ¶¶ 63, 68. Moreover, the probation condition imposed here failed to provide exceptions allowing the respondent to have contact with individuals for legitimate purposes, including contact with family members, classmates, and coworkers. *Id*. ¶ 63. The court was particularly troubled by the fact that the probation condition prevented the respondent from having any contact with his own brother, a former gang member who had turned his life around and now served as a role model for the respondent. *Id*.

¶ 44 The court came to the same conclusion regarding an identical probation condition in *K.M.* and *J'Lavon T. K.M.*, 2018 IL App (1st) 172349, ¶¶ 25-27; *J'Lavon T.*, 2018 IL App (1st) 180228, ¶ 15. As in *K.M.*, *J'Lavon T.*, and *Omar F.*, the prohibition on respondent associating

with known gang members fails to differentiate between lawful and unlawful conduct. *Id.*; *Omar F.*, 2017 IL App (1st) 171073, ¶¶ 63, 68. As a result, it prohibits innocuous or innocent associations that respondent may engage in on a daily basis, such as at school or work. See *id.* Accordingly, the probation condition imposed here, like the condition in *K.M.*, *J'Lavon T.*, and *Omar F.*, burdens respondent's constitutional rights substantially more than is necessary and is unconstitutionally overbroad. See *id.* Accordingly, we vacate the respondent's gang-related probation conditions and remand the matter for the trial court to consider whether such restrictions are still warranted, and if so, what appropriate exceptions should be applied so that the restriction is reasonably tailored to respondent.

¶ 45 CONCLUSION

¶ 46 For the reasons stated above, we affirm in part and reverse and remand in part.

¶ 47 Affirmed in part; reversed and remanded in part.

¶ 48 JUSTICE GORDON, concurring in part and dissenting in part:

¶ 49 I concur with all of the majority's findings, except the majority's decision to vacate the respondent's gang-related probation conditions of "no gang contact or activity." For the following reasons, I dissent from the majority's finding that the trial court's gang prohibition was unconstitutional.

¶ 50 Neither the minor nor the minor's family who was with him in court posed any questions. The minor's counsel, who was also present in court, also had no questions.

¶ 51 There is a process, set in place by our legislature, that the majority ignores. A juvenile defendant is expected to work with his or her probation officer and the juvenile court. The appellate court was not designed to be the place of first resort if the juvenile does not understand a probation condition or finds a condition too cumbersome to work in practice.

¶ 52 In the case at bar, the record does not show that the juvenile defendant ever registered a word of complaint about the probation condition until this appeal. The minor, his counsel and his family voiced no complaint to the juvenile court about this recommendation.

¶ 53 The Juvenile Court Act of 1987 (the Act) (705 ILCS 405/1-1 *et seq.* (West 2016)) contemplates that a juvenile defendant will be regularly monitored. At least every six months the probation officer sends a report to the juvenile court. 705 ILCS 405/5-744(2) (West 2016).[2] In addition, anyone interested in the minor, including the minor himself, can request a change in condition. 705 ILCS 405/5-743(3) (West 2016) ("[t]he minor or any person interested in the minor may apply to the [juvenile] court for a change").

¶ 54 In addition, the juvenile court may terminate probation satisfactorily at any time. 705 ILCS 405/5-715 (West 2016) (the juvenile court may terminate probation "at any time if warranted by the conduct of the minor and the ends of justice"). For all this court knows, the juvenile defendant's probation may have already terminated satisfactorily and we may be issuing a moot opinion.

¶ 55 The juvenile defendant always had, and still has, the ability to ask his probation officer and the juvenile court for a change in condition. He did not need us or this opinion to do that. He always had that ability and—as far as we know—he chose not to exercise it.

¶ 56 The last thing that a reviewing court, with a frozen and out-of-date record, should want to do is to encourage a juvenile to rush to appeal, bypassing the mechanisms set in place by our legislature, which decided that a juvenile's probation conditions should be considered, first and foremost, by the people with their feet on the ground—the probation officer and the juvenile

[2] The Act requires the juvenile defendant's guardian or legal custodian, who may be his probation officer, to "file updated case plans with the court every six months." 705 ILCS 405/5-744(2) (West 2016); 705 ILCS 405/5-740 (West 2016) (permitting placement "under the guardianship of a probation officer").

court. 705 ILCS 405/5-743(3), 744(2) (West 2016). See also 705 ILCS 405/5-740 (West 2016).

¶ 57 It is the juvenile's probation officer who is tasked with the job of keeping up with the ever-changing, minute-to-minute, world of gangs, members, signs and symbols; and the juvenile court's condition of probation gives the probation officer the tools and flexibility to attempt to keep the juvenile out of trouble. *In re R.H.*, 2017 IL App (1st) 171332, ¶ 33 (any "prohibition would become stale the moment the members of that gang decided to change their shirts, move their activities, or splintered to form new, separate gangs"). The goal is to help this minor finish school, live with his parents and stay away from gangs.

¶ 58 Minors have some, but not all, of the same constitutional protections afforded to adults, because of the particular vulnerability of children and their inability to make mature, nuanced decisions. *In re R.H.*, 2017 IL App (1st) 171332, ¶¶ 20, 27. Our Illinois Juvenile Court Act provides: "This Act shall be administered in a spirit of humane concern, not only for the rights of the parties, but also for the fears and the limits of understanding of all who appear before the court." 705 ILCS 405/1-2 (West 2016). See also *In re R.H.*, 2017 IL App (1st) 171332, ¶ 15 (discussing the "*parens patria*" concerns expressed in both the Act and Illinois case law).

¶ 59 If the juvenile had objected—at any time—to the court below and if the court had flat-out refused his request, then this case would be in a different posture. But that is not the case before us.

¶ 60 The trial court, as well as respondent, are well aware of the gangs and the turf in the community in which respondent resides. If respondent had any questions about what the trial court meant when it stated no gang contact or activity, he and his family and lawyer had the opportunity to object in court, or could have asked the court for a clarification. Their silence tells us that they knew exactly what the court meant. If this becomes a problem, respondent and his

family can contact the probation officer to obtain a clarification. In the future, the trial court should explain what it means when it rules that a respondent cannot have gang contact or activity.

¶ 61 I cannot join in an opinion that undercuts the process set forth by our legislature and undermines the authority of the juvenile court and its officers. Thus, I must respectfully dissent from the majority's finding that respondent's probation condition was unconstitutional. See *In re E.H.*, 224 Ill. 2d 172, 178 (2006) ("cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort").