

2018 IL App (2d) 151052-U
No. 2-15-1052
Order filed March 5, 2018

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 15-CF-363
)	
DEVIN NORMAN BOOSE,)	Honorable
)	John R. Truitt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The State proved defendant guilty beyond a reasonable doubt of being an armed habitual criminal, specifically that he constructively possessed a shotgun, as evidently defendant brought the gun into his house and kept it there, albeit in a bedroom occupied by another person; (2) defendant was entitled to full credit against two fines, to reflect his time in presentencing custody; (3) we vacated defendant's successive (and thus unauthorized) DNA analysis fee.

¶ 2 Following a bench trial in the circuit court of Winnebago County, defendant, Devin Norman Boose, was found guilty of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2014)) and possession with intent to deliver more than 30 but not more than 500 grams of

cannabis (720 ILCS 550/5(d) (West 2014)).¹ Defendant argues on appeal that the State failed to prove beyond a reasonable doubt that he was guilty of being an armed habitual criminal. Defendant further argues that he did not receive proper credit against his fines and that he was wrongly ordered to pay a DNA analysis fee.

¶ 3 Evidence presented at trial establishes the following facts. On February 13, 2015, a group of Rockford police officers executed a warrant to search the premises at 1004 North Winnebago Street for narcotics. Officer William Donato knocked on the front door of the residence at that address and yelled “police, search warrant,” several times. When nobody answered after about 20 to 30 seconds, the officers entered the premises by force. There were about 12 to 14 people in the residence, including defendant and his brother, Thomas Boose. At some point, Thomas was permitted to leave the house after telling officers that he did not reside there.

¶ 4 Defendant was found in the hallway outside an upstairs bedroom at the southwest part of the house. Donato read a copy of the search warrant to defendant and his mother, Rosie Boose. Defendant and his mother told Donato that they were the owners of the house. According to Donato, defendant “told us it was unnecessary to tear up his house, and that we were just going to find weed.” Notwithstanding that assurance, a sawed-off shotgun was found in an upstairs bedroom at the northeast part of the house. The shotgun was located in the bed, between the mattress and the box spring. A plastic bag containing live shotgun rounds was found in the basement, as was a box for the rounds. Cannabis was found in the upstairs southwest bedroom. Defendant was arrested as a result of these discoveries.

¹ Defendant was also found guilty of other offenses, but the trial court merged those offenses into the convictions of being an armed habitual criminal and possession with intent to deliver cannabis.

¶ 5 Donato testified that, after the shotgun was found, defendant said that the shotgun was Thomas's and that the officers should not have allowed Thomas to leave. Defendant stated that he had already told Donato not to let Thomas leave. Donato testified that defendant had not told him that. Later, an officer contacted Thomas and told him to return to the home.

¶ 6 Thomas testified for the State under a grant of immunity. He indicated that, on the date of the search, he lived at 2208 Wallace Street with his girlfriend, but she often kicked him out. When she did, he would stay at 1004 North Winnebago Street. On the date of the search, Thomas was visiting at 1004 Winnebago Street, as he often did. The police searching the premises allowed him to leave, but he was later called back to the residence. When he returned, Thomas told the police that the shotgun belonged to defendant and had been given to him by a friend named S.B. Thomas was taken to the police station, where he gave a written statement indicating that about two months earlier, as he was leaving the house, he saw defendant talking with S.B. S.B. gave defendant a shotgun. Thomas heard defendant say that he did not have use for a shotgun. S.B. told defendant to just take it. According to Thomas's statement, defendant put the shotgun inside his left pant leg and walked back into the house. Thomas testified at trial that his statements to the police were untrue and that the shotgun actually belonged to him. S.B. had given Thomas the shotgun. Thomas had children and did not want to keep the shotgun at his own home. He decided that the best place to hide it was at his mother's house. On cross-examination, Thomas acknowledged that he had a conviction of murder and had been released from incarceration in March 2007, which was less than 10 years before trial. The trial court ruled that Thomas's written statement, which was inconsistent with his trial testimony, was admissible as substantive evidence.

¶ 7 Following his arrest, defendant was interviewed by the police. Asked if the shotgun was his, he denied any knowledge of it. Defendant told the police that Thomas had been sleeping in the living room of the Winnebago Street home for about a week. When confronted with Thomas's statement, defendant claimed that S.B. had given the shotgun to Thomas and that Thomas walked into the house with it.

¶ 8 Tamesa Holmes testified for the defense that defendant was her fiancé and they had one child together. On February 13, 2015, she was living at 1004 North Winnebago Street with defendant, Rosie, and Thomas. Her children—Anastasia, Yvonne, Devonte, Devin Junior, Dynasty, and Destiny—also lived at 1004 North Winnebago Street. As of February 13, 2015, Holmes and her children had been living there for seven or eight months. Thomas lived there “off and on” and was staying there on February 13, 2015. At that time he had been at the house for a couple of weeks. Holmes testified that her 15-year-old daughter from a previous relationship—Anastasia—had the upstairs northeast bedroom.

¶ 9 Tiera Floyd testified that defendant was the twin brother of her boyfriend, Kevin Boose. Floyd testified that Thomas stayed at 1004 North Winnebago on a regular basis and was staying there on February 13, 2015. Floyd was present that day when, at about 5 or 6 p.m., the police raided the home. A few days earlier, Floyd saw Thomas at the home with a shotgun. He had it at his hip, and he pulled up his shirt to show it to Floyd. Floyd testified that Thomas had also shown her the shotgun on a prior occasion.

¶ 10 Finding that the testimony of Thomas, Holmes, and Floyd was not credible, the trial court found defendant guilty of possession of cannabis with intent to deliver and of being an armed habitual criminal. This appeal followed.

¶ 11 Section 24-1.7(a) of the Criminal Code of 2012 (Code) (720 ILCS 5/24-1.7(a) (West 2014)) provides, in pertinent part, that “[a] person commits the offense of being an armed habitual criminal if he or she *** possesses *** any firearm after having been convicted a total of 2 or more times of any combination” of offenses set forth in sections 24-1.7(a)(1) and 24-1.7(a)(2) of the Code (720 ILCS 5/24-1.7(a)(1), (a)(2) (West 2014)). Defendant does not dispute that he had two qualifying prior convictions. Defendant contends that the evidence failed to establish his possession of the shotgun and was therefore insufficient to sustain his conviction of being an armed habitual criminal.

¶ 12 A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant’s guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When we review a challenge to the sufficiency of the evidence, “ ‘the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact is responsible for resolving conflicts in the testimony, weighing the evidence, and determining what inferences to draw, and a reviewing court ordinarily will not substitute its judgment on these matters for that of the trier of fact. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000).

¶ 13 Possession of contraband may be either actual or constructive. *People v. Terrell*, 2017 IL App (1st) 142726, ¶ 18. A criminal defendant has constructive possession of contraband where “there is no actual, personal, present dominion over contraband, but defendant had knowledge of the presence of the contraband, and had control over the area where the contraband was found.” *People v. Hunter*, 2013 IL 114100, ¶ 19. Accordingly, where possession of contraband is an

element of a criminal offense, “the State must prove beyond a reasonable doubt that the defendant had knowledge of the presence of the contraband and exercised ‘immediate and exclusive’ control over the area where the contraband was discovered.” *Terrell*, 2017 IL App (1st) 142726, ¶ 18 (quoting *People v. Tate*, 2016 IL App (1st) 140619, ¶ 19). “Habitation in the residence in which the firearm is found is sufficient evidence of control to establish constructive possession.” *People v. Sams*, 2013 IL App (1st) 121431, ¶ 10.

¶ 14 Defendant argues that proof of constructive possession was lacking. He notes that, although he was apprehended outside the southwest bedroom in which cannabis that belonged to him was found, the shotgun was found in a different bedroom that belonged to his fiancé’s daughter, Anastasia Holmes. Defendant argues that “[t]here simply was no evidence the defendant had immediate and exclusive control over the bedroom where the weapon was located.” Defendant notes that there was no evidence that he “stayed in or had significant connections to” that bedroom. Defendant also contends that, because the police entered the residence swiftly, defendant would not have had time to hide the shotgun in Anastasia’s bedroom.

¶ 15 These arguments are unpersuasive. Residential bedrooms might have privacy locks, but they do not ordinarily have key locks. Thus, although the bedroom was Anastasia’s, it is likely that defendant had physical access to the bedroom. Moreover, defendant was not simply an inhabitant of the residence; he claimed to be one of its owners. As such, it may be inferred that, even though Anastasia normally occupied that bedroom, defendant had sufficient control of the bedroom to sustain a finding of constructive possession.

¶ 16 It is also significant that there was evidence that the shotgun had been given to defendant and that he surreptitiously brought the shotgun into the house. Defendant acknowledges that,

under certain circumstances, a defendant's prior possession of an article of contraband lends support to a finding that the defendant had constructive possession when the contraband was found by police. Defendant cites *People v. Adams*, 161 Ill. 2d 333 (1994), as an example.

¶ 17 In one of the consolidated cases in *Adams*, the defendant, Gloria Valdez, was found guilty, under accountability principles, of possession of a controlled substance. She and two male associates boarded a flight from Miami to Minneapolis-St. Paul, with one stop in Chicago. Shortly before takeoff, a flight attendant observed that the two men both used the lavatory. It was unusual for passengers to use the lavatory before takeoff. After the plane departed, the flight attendant searched the lavatory and found bags of cocaine underneath the liner of a trash receptacle. When the plane landed in Chicago, the defendant and her associates were taken off the plane. The defendant was ultimately arrested. In upholding her conviction, the *Adams* court reasoned as follows:

“In reviewing a conviction for possession of a controlled substance, the dispositive issue is not whether a defendant had control over the place where the drugs were found, but whether the defendant had possession of the drugs themselves. Proof that a defendant had control over the premises where the drugs were located can help resolve this issue because it gives rise to an inference of knowledge and possession of the drugs [citation], but it is not a prerequisite for conviction. Indeed, not only does a defendant not need to control the premises, he does not even need to have actual, personal, present dominion over the drugs themselves. [Citation.] *Constructive possession may exist even where an individual is no longer in physical control of the drugs, provided that he once had physical control of the drugs with intent to exercise control in his own behalf, and he*

has not abandoned them and no other person has obtained possession.” (Emphasis added.) *Id.* at 344-45.

¶ 18 Defendant argues that *Adams* is distinguishable because “any contact by the defendant with the gun was merely transitory and no reasonable finder of fact could presume the defendant continued to maintain dominion and control over the weapon.” Defendant notes that he was not seen with the weapon after bringing it into the house. Again, we find defendant’s argument unpersuasive. According to Thomas’s written statement, which was used as substantive evidence, defendant obtained possession of the shotgun from S.B. Furthermore, the trial court was not required to find that defendant abandoned the shotgun. This is so because “[w]hen the existence of a condition is in question, prior existence of that condition indicates a probability of its continuation at a later time.” *People v. Bates*, 165 Ill. App. 3d 80, 82 (1987). We thus conclude that the State proved defendant’s guilt beyond a reasonable doubt.

¶ 19 We turn our attention to defendant’s argument that he did not receive proper credit against his fines and that he was wrongly ordered to pay a DNA analysis fee. Defendant was ordered to pay, *inter alia*, a \$500 fine and \$500 drug assessment (see 720 ILCS 570/411.2 (West 2014)). Defendant argues that he is entitled to monetary credit toward these amounts based on the time he spent in custody prior to sentencing. Section 110-14(a) of the Code of Criminal Procedure of 1963 provides:

“Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine.” 725 ILCS 5/110-14(a) (West 2014).”

The drug assessment is considered a fine. *People v. Jones*, 223 Ill. 2d 569, 588 (2006).

¶ 20 The record reveals that defendant was in custody for 229 days before sentencing, and he is therefore entitled to a credit of \$1145 toward his \$500 fine and his \$500 drug assessment. As the State acknowledges, the credit completely satisfies these items.

¶ 21 Defendant also contends that he should not be charged a DNA analysis fee (see 730 ILCS 5/5-4-3(a), (j) (West 2014)). Once a particular defendant has given a DNA sample and paid the DNA analysis fee, he or she is not required to give another DNA sample or pay another fee in connection with subsequent offenses. *People v. Marshall*, 242 Ill. 2d 285, 296-97 (2011). Defendant contends, and the State acknowledges, that defendant's DNA was sampled, and he paid a DNA analysis fee, in connection with a prior conviction. Thus, defendant should not be required to pay the fee now. We vacate the fee.

¶ 22 For the foregoing reasons, we affirm defendant's convictions, modify the judgment to reflect satisfaction of defendant's fine and drug assessment, and vacate the DNA analysis fee. 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 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 23 Affirmed as modified in part and vacated in part.