2019 IL App (1st) 170472-U

Sixth Division
March 1, 2019

No. 1-17-0472

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 17672
	)	
LARRY MOORE,	)	Honorable
	)	Neera Lall Walsh,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: We affirm defendant's convictions for unlawful use or possession of a weapon by a felon where the discovery of a state agency letter, state identification card, credit card, and debit card, along with defendant's statement to the police, were sufficient to establish that he constructively possessed a firearm and ammunition found in the same room. Fines and fees order corrected.

¶ 2 Following a bench trial, defendant Larry Moore was convicted of two counts of unlawful use or possession of a weapon by a felon and sentenced to concurrent terms of four years' imprisonment. On appeal, defendant argues that the evidence was insufficient to prove him

guilty beyond a reasonable doubt where the State failed to establish that he resided in an apartment where a firearm and ammunition were found, and therefore, that he had constructive possession of those items. Defendant further maintains that he is entitled to presentencing credit on various fines and fees. We affirm defendant's convictions and amend the fines and fees order.

¶ 3 Defendant was charged by indictment with four counts of unlawful use or possession of a weapon by a felon. The State proceeded on two counts, unlawful possession of a firearm (count I) and ammunition (count II) (720 ILCS 5/24-1.1(a) (West 2014)), and nol-prossed the remaining counts. As to counts I and II, the State sought to sentence defendant as a Class 2 offender for having previously been convicted of a Class 2 or greater felony violation of the Illinois Controlled Substances Act (720 ILCS 570/100 *et seq.* (West 2014)).

¶ 4 At trial, Chicago police officer Martinez testified that, at approximately 1:15 p.m. on October 2, 2015, he executed a search warrant at a two-unit apartment building at 5935 South Lafayette Avenue in Chicago, Illinois, with Sergeant Pendarvis and Officers Reed and Banda.[1] Prior to entry, the officers observed defendant standing outside a residence located at 5933 South Lafayette. Pendarvis and Reed detained defendant while Martinez entered into Apartment 2, the unit subject to the search warrant. The unit's door was closed but unlocked, and no one was inside.

¶ 5 Martinez performed a "systematic" search of the apartment, which included two bedrooms and one storage room. In the middle bedroom, Martinez discovered a .22-caliber Ruger handgun, loaded with three live rounds, "protruding" from the pocket of a shirt that was hanging on the back of the bedroom door, within five feet of a dresser. In a dresser drawer,

[1] The first names of the officers do not appear in the record.

Martinez discovered three live rounds of .45-caliber ammunition. Other items retrieved and inventoried from the drawer included defendant's state identification card, dated April 2014, which listed his address as 7215 South Claremont Avenue; a credit and debit card bearing defendant's name; and an unopened letter from the Department of Human Services addressed to defendant at 5935 South Lafayette. Officers opened the letter, which was dated July 17, 2015, and contained information regarding defendant's eligibility for the Supplemental Nutritional Assistance Program. Photographs of the drawer entered into evidence also depicted receipts and a watch, bottle cap, whisk, pliers, black car key, loose change, pliers, and latex gloves. On cross-examination, Martinez acknowledged that no keys or photographs of defendant were inventoried as part of the investigation.

¶ 6 Reed testified that, following the search, defendant was given *Miranda* warnings and questioned by Pendarvis outside of the residence. Defendant asked what the officers found, and Pendarvis responded, "you know what we found." Defendant replied, "Oh. You found the 22."

¶ 7 The State admitted a certified copy of defendant's 2011 Class I felony conviction for the manufacture or delivery of a controlled substance, and rested. Defendant moved for a directed finding, which was denied.

¶ 8 Dana Givens, defendant's mother, testified that she resided at 5935 South Lafayette, Apartment 2, with her boyfriend, who was the leaseholder, and her older son. Givens stated that defendant would sometimes visit her and her brother, who lived next door, but that defendant resided with his girlfriend at an unknown address. On occasion, defendant would sleep in the TV room and receive correspondence from the Department of Human Services at the apartment because it provided him with a stable mailing address, although he did not receive credit card

bills or other mail there. Givens denied seeing a handgun in the apartment, but stated that the middle bedroom, and the possessions and clothing in the room, belonged to her older son. Defendant did not have his own keys to the apartment, but on cross-examination, Givens acknowledged that she would give defendant a set from time to time. Givens also noted that she locked the doors to the apartment when she left on October 2, 2015, but when she returned following the execution of the search warrant, she noticed that the doors had not been broken into. Givens did not believe that her older son was on the block when the police executed the search warrant. She added that she would occasionally clean the entire residence, which included washing the dirty laundry from the middle bedroom.

¶ 9 The trial court found defendant guilty of two counts of unlawful use or possession of a weapon by a felon. The trial court stated, in relevant part, that the police recovered the state identification card with defendant's photograph, and three pieces of "proof of residency," namely the credit card, debit card, and the Department of Human Services letter. While the identification card listed a different address, the trial court noted that defendant received the Department of Human Services letter at the apartment because "his own mother says he doesn't have a stable address." Additionally, the trial court stated that the credit and debit cards were personal and valuable items, unlike junk mail, and "were things that are critical for a person to have with them[,] especially someone whose residence—He may not have resided there, but he definitely was there sometimes and he was there and this weapon was there." The trial court also noted that defendant's statement to the police showed that he had knowledge of the weapon.

¶ 10 Defendant filed a motion to reconsider, or in the alternative, a motion for a new trial, which was denied. Following a hearing, defendant was sentenced to concurrent terms of four

years' imprisonment and ordered to pay $504 in fines, fees, and costs. His motion to reconsider sentence was denied.

¶ 11 On appeal, defendant first argues that the State's evidence was insufficient to establish that he constructively possessed the ammunition and handgun. Defendant notes that no one was present in the apartment when the officers conducted a systematic search, which failed to yield utility bills or a lease agreement in his name, personal photographs, or a set of keys to the apartment. Defendant maintains that he never admitted to living in the apartment or possessing the handgun, and that his state identification card listed a different address. The State argues that the evidence proved that defendant constructively possessed the handgun and ammunition because the state identification card, credit card, debit card, and the Department of Human Services letter established that defendant resided at the apartment. The State also notes that defendant knew about the handgun, had access to the apartment, slept there, and was found outside the premises prior to the execution of the search warrant.

¶ 12 The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). When a defendant challenges the sufficiency of the evidence presented at trial, it is not the function of a reviewing court to retry the defendant. *Id.* "The trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court and jury that saw and heard the witnesses." *Id.* at 114-15. Hence, a defendant's conviction will not be set aside unless "the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt." *People v.*

Collins, 214 Ill. 2d 206, 217 (2005). Furthermore, the State is not required to disprove every reasonable hypothesis of innocence. *People v. Pintos*, 133 Ill. 2d 286, 291 (1989).

¶ 13 To sustain a conviction for unlawful possession of a weapon by a felon, the State must prove that defendant had a prior felony conviction and that he knowingly possessed a firearm and ammunition (720 ILCS 5/24-1.1(a) (West 2014)). Here, defendant only contests the element of knowing possession.

¶ 14 Possession may be actual or constructive. At trial, the State pursued a theory of constructive possession. "Constructive possession exists 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. Evidence of constructive possession is most often circumstantial. *People v. Fernandez*, 2016 IL App (1st) 141667, ¶ 18. "The trier of fact is entitled to rely on an inference of knowledge and possession sufficient to sustain a conviction absent other factors that might create a reasonable doubt as to the defendant's guilt." *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003).

¶ 15 "Habitation of the location where contraband is found can constitute sufficient evidence of control to establish constructive possession." *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 29 (citing *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17; *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999)). "Numerous reported decisions reference mail as part of the evidence used to support an inference that the defendant controlled the location where the contraband was recovered regardless of whether the defendant was present at the time of the seizure." *Maldonado*, 2015 IL App (1st) 131874, ¶ 29. However, "[w]hile it is clear from

existing case law that mail addressed to a defendant found where contraband is recovered may be sufficient to allow an inference of residency, and thereby control," this court has explained that "we will not draw the same inference when a defendant is not present during the execution of a search warrant and other indicia of residency or an admission of residency is not shown." *Id.* " 'Proof of residency in the form of rent receipts, utility bills and clothing in closets is relevant to show the defendant lived on the premises and therefore controlled them.' " *Cunningham*, 309 Ill. App. 3d at 828 (quoting *People v. Lawton*, 253 Ill. App. 3d 144, 147 (1993)). "Mere access by other individuals" to the contraband "is insufficient to defeat a charge of constructive possession." *People v. Denton*, 264 Ill. App. 3d 793, 798 (1994).

¶ 16 Here, Officer Martinez testified that the search of the middle bedroom in the apartment at 5935 South Lafayette yielded a loaded .22-caliber handgun found in the pocket of a shirt hanging on the bedroom door. Less than five feet from the door, in a dresser drawer, officers found three live rounds of ammunition, defendant's state identification card dated April 2014, credit and debit cards listing defendant's name, and an unopened letter from the Department of Human Services, dated July 2015, which was addressed to defendant at the searched residence. In a statement to police, defendant guessed that the police found a .22-caliber handgun during the search. All the items were stored inside the same room in an apartment that Givens characterized as a stable mailing address for defendant, and where he occasionally spent the night. On cross-examination by the State, Givens stated that she sometimes gave defendant a set of keys to the apartment.

¶ 17 Viewing this evidence in the light most favorable to the State, we find the evidence sufficient to prove beyond a reasonable doubt that defendant constructively possessed the

handgun and ammunition recovered during the execution of the search warrant. Defendant's statement to police showed that he knew the gun was in the apartment. While defendant was not arrested at the apartment, the letter addressed to him there was not the only indicia of habitation. The trial court concluded that, unlike junk mail, the credit and debit cards were personal in nature and "critical for a person to have with them." Thus, although Givens testified that the middle bedroom belonged to defendant's older brother, other evidence showed that defendant's possessions were found there. The trial court is "is free to accept or reject as much or as little as it pleases of a witness' testimony," and we will not reweigh the evidence on appeal. *People v. Logan*, 352 Ill. App. 3d 73, 81 (2004); *People v. Contreras*, 327 Ill. App. 3d 405, 408 (2002). Further, mere access to contraband by another individual is insufficient to defeat constructive possession. *Denton*, 264, Ill. App. 3d at 798. Moreover, it could be inferred that defendant resided at the apartment because he was standing next door when the officers executed the search warrant at the unlocked residence.

¶ 18 Defendant maintains that the evidence was insufficient because reasonable justifications could explain why his possessions were found inside the apartment—for example, the possibility that defendant's effects were placed within the dresser drawer by his mother. The trier of fact, however, was " 'not required to disregard inferences which flow normally from the evidence and to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt.' " *Wheeler*, 226 Ill. 2d at 117 (quoting *People v. Hall*, 194 Ill. 2d 305, 332 (2000)). Furthermore, the State was not required to disprove every reasonable hypothesis of innocence. *Pintos*, 133 Ill. 2d at 291.

¶ 19 In support of his position that this evidence did not prove beyond a reasonable doubt that he resided in the apartment, defendant relies on *People v. Alicea*, 2013 IL App (1st) 112602, where the defendant was found guilty of two counts of unlawful possession of a weapon by a felon based on evidence that two loaded handguns and a check addressed to the defendant were found in the same bedroom. *Id.* at ¶ 6. On appeal, this court found that the evidence supporting an inference of residency was insufficient "in the face of other evidence," including testimony that the defendant resided with his girlfriend and that his daughter would deposit checks on his behalf. *Id.* at ¶¶ 28, 31-32. We find *Alicea* distinguishable. In *Alicea*, this court acknowledged that a check addressed to the defendant at the searched residence was found inside a dresser, but concluded that "not one other bill or piece of mail addressed to [the defendant] was found." *Id*. at ¶ 31. Here, there were multiple items with defendant's name found within the residence, and it was undisputed that defendant would sometimes spend the night at the apartment and receive a set of keys.

¶ 20 Based on the foregoing, the evidence presented at trial, when viewed in the light most favorable to the State, was sufficient for any rational trier of fact to find defendant guilty beyond a reasonable doubt of unlawful use or possession of a weapon by a felon. Therefore, defendant's convictions are affirmed.

¶ 21 Defendant next contends that he is entitled to presentencing credit against a $15 State Police Operations Fee (705 ILCS 105/27.3a(1.5) (West 2014)); $50 Court System Fee (55 ILCS 5/5-1101(c) (West 2014)); $2 Public Defender Records Automation Fee (55 ILCS 5/3-4012 (West 2014)); $2 State's Attorney Records Automation Fee (55 ILCS 5/4-2002.1(a) (West 2014)); $190 Felony Complaint Filed, (Clerk) charge (705 ILCS 105/27.2a(w)(1)(A) (West

2014)); $25 Automation (Clerk) charge (705 ILCS 105/27.3a(1) (West 2014)); and a $25 Document Storage (Clerk) charge (705 ILCS 105/27.3(c) (West 2014)). He maintains that these assessments are fines, and thus subject to a *per diem* monetary credit.

¶ 22 Defendant concedes that he did not object to the trial court's order imposing monetary assessments or to their classification as fines or fees, and therefore forfeited the issue. The State acknowledges the forfeiture, but agrees that the fines and fees order should be modified. Since the State has waived any argument regarding defendant's forfeiture, we will consider defendant's claims. See *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46 (the rules of waiver and forfeiture apply to the State).

¶ 23 Whether fines and fees were properly assessed is a question of statutory interpretation, subject to *de novo* review. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007). Section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2014)), provides for a $5-per-day credit for any person who is incarcerated on a bailable offense but does not pay bail. The credit applies from the time defendant is in pretrial custody up to the time of sentencing. *People v. Rivera*, 378 Ill. App. 3d 896, 899 (2008). "[T]he credit applies only to 'fines' that are imposed pursuant to a conviction, not to any other court costs or fees." *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006). "A 'fee' is defined as a charge that 'seeks to recoup expenses incurred by the state,' or to compensate the state for some expenditure incurred in prosecuting the defendant." *People v. Graves*, 235 Ill. 2d 244, 250 (2009) (quoting *People v. Jones*, 233 Ill. 2d 569, 582 (2006)). A fine, however, is meant to be punitive in nature. *Graves*, 235 Ill. 2d at 250.

¶ 24 The record reflects that defendant was in custody for 488 days before sentencing, and therefore, entitled to up to $2440 toward his eligible assessments. Defendant contends, and the

State concedes, that he is entitled to presentencing credit against the $15 State Police Operations Fee and $50 Court System Fee. We agree. See *People v. Brown*, 2017 IL App (1st) 142877, ¶ 74 (State Police Operations fee is a fine subject to presentencing credit); *People v. Reed*, 2016 IL App (1st) 140498, ¶ 15 (Court System Fee is a fine subject to a *per diem* credit).

¶ 25 The parties, however, disagree on whether defendant is entitled to presentencing credit against the $2 Public Defender Records Automation Fee; $2 State's Attorney Records Automation Fee; $190 Felony Complaint Filed, (Clerk) charge; $25 Automation (Clerk) charge; and a $25 Document Storage (Clerk) charge. Our supreme court has held that these assessments are fees intended to compensate the State for costs incurred in prosecuting a defendant. *People v. Clark*, 2018 IL 122495, ¶ 51. Thus, defendant is not entitled to offset these fees with his presentence incarceration credit.

¶ 26 Based on the foregoing, we affirm defendant's convictions and modify the fines and fees order to reflect a total owed of $439.

¶ 27 Affirmed; fines and fees order corrected.