

SIXTH DIVISION
AUGUST 16, 2019

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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 15335
)	
TAVARRIS WHITE,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant could not show that he was prejudiced by counsel's failure to file a pretrial motion to quash arrest where the record does not demonstrate that such a motion would have succeeded. The evidence was sufficient to prove beyond a reasonable doubt that defendant constructively possessed a firearm.

¶ 2 Following a bench trial, defendant Tavarris White was found guilty of being an armed habitual criminal and sentenced to 7½ years in prison. He now appeals, arguing that (1) his trial

counsel was ineffective for failing to argue that his arrest was illegal, and that therefore, evidence of his “identity” and criminal history should be suppressed, and (2) the State failed to prove beyond a reasonable doubt that he constructively possessed a firearm. For the following reasons we affirm the judgment of the circuit court of Cook County.

¶ 3 Defendant was charged by indictment with, *inter alia*, being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2014)) after police discovered a firearm in a vehicle in which he was a passenger. Prior to trial, defense counsel filed a motion entitled “MOTION SUPPRESS,” arguing that the prearrest search of the vehicle by the police violated the defendant’s fourth amendment rights. The motion stated that, under *Arizona v. Gant*, 556 U.S. 332 (2009), the police may only conduct a warrantless search of a vehicle “if the arrestee is within reaching distance of the passenger compartment or there is a reasonable belief that the vehicle contains evidence of the offense of the arrest.” Consequently, defense counsel maintained that the search was unlawful and that any evidence (*i.e.*, the firearm) obtained as a result must be suppressed. The motion did not challenge defendant’s arrest or claim that it was not supported by probable cause. The trial court considered the motion simultaneously with the defendant’s bench trial, where the State proceeded only on the armed habitual criminal charge.

¶ 4 Chicago police officer Michael Carrasco testified that he and his partner, Officer Jermira Trapp, were patrolling near 80th Street and South Drexel Avenue around 10:20 p.m. on September 4, 2015. Officer Carrasco observed a Chevrolet Impala driving in the wrong direction on 81st Street. The Impala turned northbound onto Maryland Avenue, and the police officers followed. They activated their emergency lights once the Impala turned onto 80th Street, but the vehicle did not stop. Instead, it accelerated and made a “sharp right turn” onto Drexel Avenue,

leading Officer Carrasco to believe that the occupants were attempting to flee. The Impala eventually stopped about a block and a half later when a different police vehicle blocked the street in front of it.

¶ 5 Officers Trapp and Carrasco exited their vehicle to conduct a field interview. Officer Carrasco approached the driver's side of the Impala, and Officer Trapp approached the passenger's side. The driver, later identified as Floyd Russell, and defendant, the passenger, were the only occupants. The officers ordered defendant and Russell out of the Impala and detained them at its rear. Officer Trapp alerted Officer Carrasco that she saw a firearm on the passenger-side floorboard. She recovered the weapon and handed it to Officer Carrasco as he kept Russell and defendant detained outside the vehicle. Upon inspecting the firearm, Officer Carrasco discovered that it was a loaded 9-millimeter handgun. Defendant was transported to the police station and processed, at which point Officer Carrasco learned his name and birth date. On cross-examination, Officer Carrasco explained that he did not arrest defendant until after Officer Trapp alerted him to the presence of the firearm. Defendant was not able to access the vehicle when he was detained at its rear.

¶ 6 Officer Trapp testified that she approached the passenger's side of the Impala and ordered defendant to exit. As defendant complied, Officer Trapp "immediately" observed a handgun "[i]n full view" on the floorboard "[r]ight by" the passenger's seat. She notified Officer Carrasco, and they arrested Russell and defendant. Officer Carrasco then recovered and secured the firearm. On cross-examination, Officer Trapp stated that she was unaware whether defendant had an active arrest warrant when she encountered him.

¶ 7 The State entered into evidence certified copies of defendant's two prior felony convictions, one for residential burglary in 2011 and another for unlawful use of a weapon by a felon in 2014.

¶ 8 The defense moved for a directed finding, which was denied. In arguing the motion to suppress, defense counsel stated that the issue was "whether the police officers should have had access to the interior of this vehicle." Citing *Gant*, defense counsel argued only that it was unlawful for the officers to search the Impala because Russell and defendant did not have immediate access to it when they were detained at the rear of the vehicle. The defense also argued, alternatively, that the State did not prove the defendant guilty beyond a reasonable doubt because there was no physical evidence and because Officers Trapp and Carrasco "absolutely and totally contradicted each other" about how the weapon was recovered.

¶ 9 The State responded that the police stopped the Impala after it committed traffic violations and observed the firearm in plain view when they approached the vehicle. The State also maintained that defendant "would have had to have personal knowledge" of the unconcealed firearm given his proximity to it in the Impala.

¶ 10 The trial court denied the motion to suppress, stating that it was "not contested" that the firearm was in plain view upon the officers conducting a lawful traffic stop. The court noted the inconsistencies between the officers' testimonies, but found that they did not "rise to the level" of creating reasonable doubt. Accordingly, the court found defendant guilty of being an armed habitual criminal.

¶ 11 Defense counsel filed a motion to reconsider, again arguing that the defendant was not proven guilty beyond a reasonable doubt because of the inconsistent testimony regarding the

recovery of the firearm, and because there was “no indicia of [defendant] possessing it.” The State replied that which of the two officers recovered the firearm was a collateral matter, and that defendant was proven to have possessed the weapon because “[i]t was at his feet. The[re] were two people in the car. The gun was on the floorboard next to him and the seat where he was located.”

¶ 12 The trial court denied the motion, and following a hearing, sentenced the defendant as a Class X offender to 7½ years’ imprisonment. This appeal followed.

¶ 13 We note that we have jurisdiction to review this matter as the defendant filed a timely notice of appeal. Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); R. 606 (eff. July 1, 2017).

¶ 14 On appeal, the defendant first argues that his trial counsel was ineffective in arguing the motion to suppress. In particular, the defendant contends that, instead of arguing that the firearm was the fruit of an illegal search, “defense counsel should have raised the more viable argument that the officers did not have probable cause to arrest [him] based solely on his presence near a gun.”

¶ 15 In order to show ineffective assistance of counsel, a defendant must demonstrate that (1) his counsel’s performance was objectively unreasonable, and (2) a reasonable probability exists that, but for counsel’s deficiency, the result of the proceeding would have been different. *People v. Henderson*, 2013 IL 114040, ¶ 11. Failure to establish either prong precludes a finding that counsel was ineffective. *Id.*

¶ 16 With respect to the first prong, counsel’s decision on whether to file a motion to quash arrest or suppress evidence is generally considered a matter of trial strategy and afforded great deference. *People v. Bew*, 228 Ill. 2d 122, 128 (2008); *People v. Velez*, 388 Ill. App. 3d 493, 504

(2009). In order to establish prejudice, a defendant must show that the unargued motion would have been meritorious, and that there is a reasonable probability that the outcome of the trial therefore would have been different. *Henderson*, 2013 IL 114040, ¶ 15. We review claims of ineffective assistance of counsel *de novo*. *People v. Demus*, 2016 IL App (1st) 140420, ¶ 21.

¶ 17 The defendant maintains that the unargued motion to quash arrest would have succeeded because he was arrested “based solely on his presence near a firearm” and, pursuant to our supreme court’s decision in *People v. Aguilar*, 2013 IL 112116, “possession of a gun is no longer *per se* illegal.” Thus, according to the defendant, the trial court would have granted the motion and suppressed evidence of his “identity,” which the police then used to discover that he had previously been convicted of two felonies, an element of the armed habitual criminal charge. See 720 ILCS 5/24-1.7(a) (West 2014); see also *Henderson*, 2013 IL 114040, ¶ 33 (evidence obtained through a violation of a defendant’s fourth amendment rights is inadmissible at the defendant’s trial).

¶ 18 Defendants are generally required to raise claims of ineffective assistance of trial counsel on direct appeal in order to avoid forfeiting review of the issue. *People v. Veach*, 2017 IL 120649, ¶ 47. However, where the trial record is incomplete or inadequate for a reviewing court to resolve the claim, the issue may be better suited for a collateral proceeding. *Id.* ¶ 46. This is often the case where the record is undeveloped because the source of counsel’s alleged deficiency was not litigated in the trial court. See, e.g., *Bew*, 228 Ill. 2d at 133-34 (finding the record insufficient to address the defendant’s claim that trial counsel was ineffective for failing to file a motion to suppress based on a theory not raised in the trial court). When an ineffective

assistance claim depends on evidence not adduced at trial, procedural default does not prohibit the defendant from raising the issue on collateral review. *Veach*, 2017 IL 120649, ¶ 47.

¶ 19 Here, we find that the record is inadequate to resolve the defendant's claim of ineffective assistance of counsel. The defendant's argument turns on the premise that the police lacked probable cause to arrest him. Probable cause exists where the facts known to the arresting officers at the time of the arrest are such that a reasonably cautious person would believe that a crime had been committed. *People v. Gocmen*, 2018 IL 122388, ¶ 19. The totality of the circumstances known to police need only establish a "probability of criminal activity," not proof beyond a reasonable doubt. *Id.*

¶ 20 The defendant observes that possession of a firearm in a vehicle was not *per se* illegal at the time of his arrest (see *Aguilar*, 2013 IL 112116, ¶ 21), and contends that the police arrested him based solely on his proximity to the firearm. In support of his argument, the defendant notes that Officer Trapp testified she did not know if the defendant had any outstanding warrants when the traffic stop began, and that neither officer testified that they were aware of his criminal history. However, contrary to the defendant's assertion, this does not prove that the police lacked probable cause to arrest him. See *People v. Thomas*, 2019 IL App (1st) 170474, ¶¶ 37-40 (finding that police had probable cause to arrest the defendant for unlawful possession of a firearm where he fled from police and displayed a fully-exposed firearm in public, even though they did not know whether he had a valid license for it). Importantly, the State did not have any reason to develop the record on this issue in the trial court because the defendant did not contend that the police lacked probable cause to arrest him. See *Bew*, 228 Ill. 2d at 134; *People v. Calderon*, 101 Ill. App. 3d 469, 476 (1981) (noting that the State was not obligated to adduce

testimony establishing probable cause where the validity of the defendant's arrest was not challenged, and declining to speculate "what the full evidence might have been had the State been required to justify the arrest"). Thus, as the defendant notes, the record is silent on whether the arresting officers had knowledge of other factors that would support a probability that his possession of the firearm was illegal. The limited facts that were adduced, however, showed that the defendant was the passenger in a vehicle that fled from police and the defendant was later found in the vehicle with a fully-exposed firearm at his feet. The record therefore did not affirmatively show that the officers lacked probable cause.

¶ 21 While the defendant suggests that the police had no knowledge of his identity or criminal past, the record also does not establish that the police only learned his identity and criminal history as a result of his arrest. While Officer Carrasco testified that he learned the defendant's name and date of birth at the police station, the record is silent on how and when the police learned that the defendant was legally prohibited from possessing a firearm. We cannot speculate about such an important fact. Thus, on this record, we cannot say that a motion challenging the defendant's arrest and the admission of his criminal history would have been successful. See *Henderson*, 2013 IL 114040, ¶ 11 (it is the defendant's burden to establish prejudice). Therefore, on the record before us, the defendant has not met his burden of establishing prejudice sufficient to conclude that his counsel was ineffective. So that claim fails.

¶ 22 The defendant next argues that the State failed to prove beyond a reasonable doubt that he possessed the firearm. According to the defendant, the trial evidence was insufficient to prove that he constructively possessed the firearm because it established only his knowledge of the weapon, but not his control over it.

¶ 23 When considering a challenge to the sufficiency of the evidence, a reviewing court must determine whether, taking the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Newton*, 2018 IL 122958, ¶ 24. In making that determination, the reviewing court must draw all reasonable inferences in the State’s favor, regardless of whether the evidence is direct or circumstantial. *Id.* Consequently, a conviction will be upheld unless the evidence is “so unreasonable, improbable, or unsatisfactory” that it raises a reasonable doubt of the defendant’s guilt. *Id.*

¶ 24 In order to convict the defendant of being an armed habitual criminal, the State was required to prove that he possessed a firearm after having been convicted of certain felonies at least two times. 720 ILCS 5/24-1.7(a) (West 2014). On appeal, the defendant challenges only the element of possession.

¶ 25 Possession may be actual or constructive. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. To establish constructive possession, which is at issue here, the State must prove that a defendant had both knowledge of the contraband and immediate and exclusive control over it. *Id.* Both knowledge and control are often proved through entirely circumstantial evidence. *People v. Jackson*, 2019 IL App (1st) 161745, ¶ 27.

¶ 26 Illinois courts determine whether a defendant had knowledge of a firearm in a vehicle by considering such factors as (1) the visibility of the weapon from the defendant’s location, (2) the size of the weapon, (3) the amount of time in which the defendant was able to view the weapon, and (4) whether the defendant made any gestures or movements indicative of an effort to retrieve or conceal the weapon. *People v. Davis*, 50 Ill. App. 3d 163, 168 (1977). A defendant exerts

control over a firearm where he has the intent and ability to maintain dominion over it. *Jackson*, 2019 IL App (1st) 161745, ¶ 27. A defendant's control is not diminished by the fact that others may also have access to the contraband. *Id.*

¶ 27 In this case, the firearm was in plain view within the Impala and the defendant does not dispute that he had knowledge of its presence. Rather, he argues only that the State did not prove his control because there was no evidence establishing that he handled the weapon, made any movements toward it, or that he occupied the vehicle for an extended period of time. However, the State was not required to prove any of those propositions in order to establish the defendant's control. See *id.* ¶ 27 (control is demonstrated by the intent and ability to maintain dominion over contraband); *People v. Jones*, 295 Ill. App. 3d 444, 454 (1998) (intent may be inferred from surrounding facts and circumstances).

¶ 28 The trial evidence established that, following a vehicle chase, the police observed the firearm in plain view on the floorboard immediately next to defendant's seat. Taking the evidence in the light most favorable to the State, a rational trier of fact could therefore infer that the defendant had control over the firearm. See *People v. Ingram*, 389 Ill. App. 3d 897, 900 (2009) (jury could infer that the defendant controlled a firearm on the floorboard behind his seat because he "easily could have reached over and placed it there").

¶ 29 Defendant's reliance on *People v. Day*, 51 Ill. App. 3d 916 (1977), and *People v. McIntyre*, 2011 IL App (2d) 100889, is unpersuasive. Although we agree with the defendant that his mere presence in the vehicle and knowledge of the firearm are, alone, insufficient to establish constructive possession, we find both of aforementioned cases distinguishable from the present case. In *Day*, the defendant was convicted of cannabis possession after the police initiated a

traffic stop of his vehicle. *Day*, 145 Ill. App. 3d at 916-17. Upon detecting the odor of cannabis, the police searched the vehicle and found a grocery bag containing cannabis on the floor between the legs of one of the defendant's six passengers. *Id.* at 917. On appeal, this court found that there was insufficient evidence that the defendant controlled the bag because "his status as owner-driver of the vehicle does not put him into possession of everything within the passenger area when there are passengers present who may, in fact, be the ones in possession of the contraband." *Id.* at 918.

¶ 30 Here, in contrast, the State did not rely on the defendant's status as the driver of the automobile to establish his possession of the firearm. Moreover, there were only two people in the vehicle, not seven, and the contraband was found directly beneath the defendant, not another occupant. Thus, *Day* is distinguishable.

¶ 31 In *McIntyre*, the defendant drove Garcia, the only passenger, to a nearby house after the two left a bar. *McIntyre*, 2011 IL App (2d) 100889, ¶ 2. There, Garcia pulled out a handgun and fired several shots at the house before the defendant drove them both away. *Id.* ¶ 3. Garcia admitted that he concealed the firearm in his pants and did not tell the defendant about the weapon before the shooting. *Id.* ¶ 2. After the shooting, Garcia shoved the gun under the passenger's seat. *Id.* ¶ 5. When the police pulled over the vehicle shortly thereafter, they found the firearm between the plastic base and leather portion of the passenger's seat, on the side closest to the passenger's door. *Id.* ¶ 18. Under these circumstances, this court found that there was insufficient evidence to establish that the defendant ever "had control, or the ability to exercise control, over the weapon." *Id.*

¶ 32 This is inapposite to the present case, where the firearm was recovered from directly beneath the defendant's seat, in plain view. Thus, the defendant in this case, had the ability to exercise control over the weapon, as he could have simply reached down and grabbed it. Accordingly, taking the evidence in the light most favorable to the State, we find that there was sufficient evidence to infer that the defendant constructively possessed the firearm.

¶ 33 For these reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 34 Affirmed.