

No. 95-1378

IN THE
ILLINOIS APPELLATE COURT
FIRST DISTRICT, FIRST DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

BARNEY LONZO

Defendant-Appellant.

Appeal from the Circuit Court of Cook County,
No. 92 CR 23762 —Joan Corboy, *Judge.*

**REPLY BRIEF
OF DEFENDANT-APPELLANT**

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ORAL ARGUMENT REQUESTED

REPLY BRIEF OF PLAINTIFF-APPELLANT

I. THE SHOTGUN SHOULD HAVE BEEN SUPPRESSED

The officers who entered defendant's home seized a handgun and a shotgun. In his opening brief, defendant argued that the officers did not have a lawful basis to enter the home (Def.Br. 43-49) **and that the officers did not have probable cause to seize the shotgun.** (Def.Br. 49-50.)

While the state offers a weak argument to justify the warrantless home entry *the state does not offer any argument to support the seizure of the shotgun that the officers found in the bedroom closet.* This omission is a tacit confession of error.

The state does not dispute that to come within the plain view exception, it is required to prove that the illegality of the shotgun was "immediately apparent," i.e., that upon viewing the shotgun, the officers had probable cause to believe that it was subject to seizure. *People v. Mitchell* (1995), 165 Ill.2d 211, 650 N.E.2d 1014, 1024. The state makes no effort to meet this test.

The state appears to concede that, when the officers seized the shotgun, they did not believe that the shotgun was evidence of a crime. The state does not suggest that there was anything unlawful about the shotgun and agree that no one saw the shotgun outside of the house. There is not a scintilla of evidence that the shotgun had been used to commit a crime.

The state properly does not seek to justify the seizure of the shotgun on the after-acquired evidence that defendant was a convicted felon who could not constructively possess a firearm. When they arrested defendant, the officers did

not know that he was a convicted felon. The state appears to agree with the well settled principle that the existence of probable cause turns on the fact and circumstances known to the officers at the time of the seizure and that a warrantless seizure cannot be legitimized by after acquired evidence.

As defendant argued in his opening brief, as far as the officers knew when they seized the shotgun, the firearm was being lawfully maintained in the closet of the bedroom. Defendant's repeated objections to the introduction into evidence of the shotgun (R. 663-65) should have been granted and the shotgun suppressed.

II. DEFENDANT WAS CONVICTED BECAUSE OF THE ERRONEOUS INTRODUCTION INTO EVIDENCE OF THE SHOTGUN

Defendant vigorously complained at trial about the prejudice resulting from introduction of the shotgun. The prosecutors who tried the case shared defendant's view of the importance of the shotgun: after the trial judge ruled that the prosecution could not use the shotgun, the prosecution concluded that "its ability to prosecute this case is substantially impaired" (Supp. Rec. 26) and filed a notice of appeal (which it withdrew when the trial judge reconsidered her ruling).

The state argues in this Court, however, that defendant was not prejudiced by the use of the shotgun at trial. (State's Brief 19.) It is difficult to comprehend how this argument can be made with a straight face after the state had represented in the trial court that "its ability to prosecution [would have been] substantially impaired" (Supp. Rec. 26) by exclusion of the shotgun.

Without the shotgun, the prosecution's case would have rested on the testimony of Officer Hawkins that he had observed defendant with a handgun in

the parking lot at 1203 North Laramie. Hawkins' testimony was contradicted by the police communications tape, in which he never stated that he had observed a man with a gun and in which he never gave any indication that he was in pursuit of a man with a gun. See Def.Br. 36-38.) Hawkins' testimony was also contradicted by the civilian eyewitnesses: Hawkins claimed that Omar Fattah had pointed out the defendant at 1203 North Laramie (R. 576, 611.) Omar stated that he had not pointed anyone out to the officers, because the offender was gone from the scene when the police arrived. (R. 569.)

The Court should not permit the prosecution to argue in this Court that admission of particular evidence was not prejudicial after it had represented in the trial court that exclusion of that same evidence would "substantially impair" its ability to prosecute. Defendant was convicted because of the erroneous introduction into evidence of the shotgun; the state's arguments in this Court that the shotgun was not prejudicial are wholly without merit.

III. TWO SEPARATE COUNTS WERE REQUIRED BEFORE DEFENDANT COULD BE PROSECUTED FOR POSSESSION OF TWO WEAPONS, ONE ON A THEORY OF CONSTRUCTIVE POSSESSION, THE OTHER ON A THEORY OF ACTUAL POSSESSION

The state is unable to cite a single case in which a defendant was charged in a single count indictment with actual possession of a firearm outside of his home and constructive possession of another firearm inside of his home. Instead, the state offers rote citation to respond to defendant's argument that he was improperly prosecuted for two separate offenses in a one count information.

Unlike *People v. Weber*, (1994), 264 Ill.App.3d 310, 636 N.E.2d 902, State's Brief 13, this case is not concerned with a two count indictment, which

charges the commission of a single offense on two theories. Nor is this a case like *People v. Baugh*, 145 Ill.App.3d 133, 495 N.E.2d 699, State's Brief 13, where the defendant argued that the charging instrument was "so broad" that that it failed to identify the manner in which a crime had been committed. Defendant's argument is that it was wrong to charge him in a single count information with possession of a firearm "on or about his person" and then, over repeated and specific defense objections, permit the prosecution to secure a conviction on evidence that the defendant either possessed a handgun "on or about his person" or constructively possessed a shotgun in his house.

People v. Wisslead, 1985), 108 Ill.2d 389, 484 N.E.2d 1081, cited by the State at 13, supports defendant's position that reversal is required when an information leaves "room for wide speculation as to the type of conduct being alleged." 484 N.E.2d at 1083. As defendant vigorously argued in the trial court (Supp.R. 37-38), he did not know until the day of trial that the prosecution was proceeding on two separate theories — actual possession of a handgun and constructive possession of a shotgun — in a single count information.

Nothing in *People v. DePratto*, (1976) 36 Ill.App.3d 338, 343 N.E.2d 628 (State's Brief 14) justifies a departure from the accepted and ordinary rule that separate counts are required to charge separate offenses. In *DePratto*, the defendant had been charged with one count of armed robbery and three counts of aggravated battery. Each aggravated battery count charged the commission of the same injury on different theories. The multiple counts in *DePratto* gave the defendant ample notice that the state would seek to prove an aggravated battery with evidence of great bodily harm (count one), permanent disability (count two), and use of a deadly weapon (count three). Each aggravated battery count

in *DePratto* involved the same victim; that case has nothing to do with the issue raised in this case, where two offenses were charged in a single count information.

The state is in error in its claim (State's Brief 16) that this case "parallels" *People v. Love*, (1991), 222 Ill.App.3d 428, 585 N.E.2d 189 (1991). In *Love*, the defendants have been charged in two separate counts with possession of a controlled substance with intent to deliver. 585 N.E.2d at 191. The evidence there was that the defendants had simultaneously possessed PCP and cocaine; on this basis, the Court held that the defendants could only be convicted and sentenced on one charge. *People v. Manning* (1978), 71 Ill.2d 132, 374 N.E.2d 200, also cited by the State (at 16) is to the same effect: "[T]he simultaneous possession of more than one type of controlled substance, under the circumstances shown on this record, constituted a single offense and only one sentence should have been imposed." 374 N.E.2d at 202.

Unlike *Manning* and *Love*, this case does not involve "simultaneous possession." The prosecutions' theory at trial in this case was that defendant had held the handgun in his hand and used it to threaten a storekeeper. The prosecution's theory about the shotgun was simply that defendant had constructively possessed it in the house that he shared with another. The actual possession of a handgun on the street is a different act than the constructive possession of a shotgun in a closet of a dwelling. Under Illinois law, these two offenses should have been charged in separate counts.

The state's final argument is that, notwithstanding the demands of Illinois law that separate offenses be charged in separate counts, defendant had "ample notice" that the prosecution would seek his conviction for constructive

possession of the shotgun and actual possession of the handgun. (State's Br. 18.) This is incorrect. The single count information indicated that — instead of seeking defendant's conviction for the two offenses for which he had been charged in complaints for preliminary hearing (C7-C8) — the state would be proceeding only on the actual possession theory. After the state charged defendant in a one count information, defendant's belief was that the shotgun "was just extra evidence they were going to try to dirty him up with . . . [and was not] part of this charge." (Supp. R. 38.)

Under Illinois law, defendant could not be prosecuted for two offenses — constructive possession of a shotgun and actual possession of a handgun — in a single count indictment. Accordingly, defendant's conviction should be reversed.

IV. HAWKINS' PERJURY

The state argues that the contradictions between the testimony of Officer Hawkins (that he saw defendant with a gun) and the police communications tape (which belie Hawkins' claim that he was in pursuit of an armed suspect) raised credibility issues for the jury and do not amount to perjury. (State's Br. 21-23.) Similarly, the state argues that the contradictions between Officer Hawkins and Omar Fattah were mere "inconsistencies," that go to the weight of the evidence and do not establish perjury. (State's Br. 24.) Finally, the state contends that the conflict between Hawkins and Ribi Allouli as to whether Allouli signed a criminal complaint and as to whether Allouli told Hawkins that the defendant had threatened him with a gun also raise "credibility issues best left for the trier of fact." (State's Br. 25.)

The fundamental contradictions between Hawkins' testimony, the communications tape, the testimony of Fattah, and the testimony of Allouli go beyond credibility issues and show false testimony. The Court should not credit the state's incredible explanation of the communications tape — that Hawkins withheld that he was in pursuit of an armed suspect in order to achieve credit for an arrest. (State's Br. 22). The State's scenario is not a minor departure from "proper textbook police procedure." (State's Br. 22.) The Court should refuse to believe that an officer who is in pursuit of an armed suspect would radio in "that supposedly this guy from 1203 North Laramie was last seen walking to Crystal from Laramie." (R. 416.)

The State is in error in suggesting that there is only a minor inconsistency between Hawkins and Fattah. (State's Brief 24.) Fattah unequivocally testified that the man who had been in the store with the gun was not in the parking lot when the police arrived. (R. 569.) Fattah also stated that he had not pointed anyone out to the officers. (Id.) Hawkins' claim to the contrary — that Fattah pointed out the defendant to Hawkins — is flatly at odds with Fattah's testimony.

The State seeks to excuse the contradictions between Allouli and Hawkins by arguing that Allouli "was, perhaps, uneasy or fearful about testifying and was reluctant to implicate defendant." (State's Br. 25.) There is no evidence of record to support this outrageous claim: defendant was on bond for nearly three years awaiting trial, and there can be little doubt that the police would have been informed of any attempt to intimidate any witness. Allouli testified truthfully, without threat or intimidation, when he said that he never saw defendant with a handgun. (R. 563.)

Only by ignoring the record may the state argue that it "was not endorsing, sponsoring, or supporting false testimony." (State's Br. 26.) Although, the criminal complaints were signed by Hawkins, not by Allouli. The state's direct examination of Hawkins proceeded as follows (R. 639):

Prosecutor: And did Ribi sign that complaint and take an oath that the information contained in that complaint was true?

Hawkins: Yes.

Prosecutor: You never signed the complaint, correct?

Hawkins: Right.

The state should not be permitted to escape this sponsoring of false testimony by arguing that Hawkins' credibility was a matter for the jury. Defendant's conviction should be reversed.

V. CONCLUSION

For the reasons above stated and those previously advanced, the judgment should be reversed and the case reversed outright. In the alternative, the case should be reversed and remanded for a new trial.

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