

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

K.H.,
Appellant-Respondent,

v.

State of Indiana,
Appellee-Petitioner.

March 16, 2022

Court of Appeals Case No.
21A-JV-2391

Appeal from the Elkhart Circuit
Court

The Honorable Michael A.
Christofeno, Judge
The Honorable James Fox,
Magistrate *Pro-Tempore*

Trial Court Cause No.
20C01-2107-JD-237

Bradford, Chief Judge.

Case Summary

- [1] K.H. was found to be a delinquent child after the juvenile court determined that he possessed a firearm in violation of Indiana Code section 35-47-10-5. On appeal, K.H. contends that the juvenile court lacked jurisdiction over the case and, alternatively, that the evidence is insufficient to sustain the delinquent finding. Concluding that the juvenile court did have jurisdiction and that the evidence is sufficient, we affirm.

Facts and Procedural History

- [2] On July 25, 2021, Elkhart Police Corporal Jesse Morgenthaler (“Corp. Morgenthaler”) observed K.H., who he knew from prior encounters to be a juvenile, cross the street without utilizing a crosswalk in violation of a city ordinance. K.H. caught Corp. Morgenthaler’s attention because of the way he was holding his hands near his midsection which, based on Corp. Morgenthaler’s experience as a police officer, was consistent with an attempt to conceal a firearm. Corp. Morgenthaler stopped, activated his overhead lights, and attempted to approach K.H. Upon noticing Corp. Morgenthaler, K.H. ran away, still holding his hands near his midsection. Corp. Morgenthaler eventually briefly lost sight of K.H. Soon after he regained sight of K.H., K.H. stopped running and was apprehended by Corp. Morgenthaler.
- [3] After securing K.H., Corp. Morgenthaler walked to the area where he had briefly lost sight of K.H. and found a firearm “laying kind of in the dirt, sticks,

kind of exposed, it wasn't really hidden." Tr. Vol. II p. 44. The firearm did not look rusty, was not super dirty, and looked like it had "been placed there recently." Tr. Vol. II p. 69. A K-9 officer subsequently tracked the area and alerted to the odor of a fresh human scent on the firearm, which indicated that the firearm had not been there very long because the human scent had not yet dissipated.

[4] On July 29, 2021, the State filed a delinquency petition alleging that K.H. had committed Class A misdemeanor dangerous possession of a firearm and acts that would constitute Class A misdemeanor resisting law enforcement if committed by an adult. Following a fact-finding hearing, the juvenile court entered true findings on both allegations on September 28, 2021. The juvenile court imposed a suspended commitment to the DOC and continued K.H. on probation.¹

Discussion and Decision

I. Jurisdictional Question

[5] K.H. contends that the juvenile court lacked subject matter jurisdiction to consider whether he was a delinquent child for committing dangerous possession of a firearm in violation of Indiana Code section 35-47-10-5.

¹ K.H. was on probation in an unrelated matter at the time he committed the delinquent act at issue in this case.

“Subject matter jurisdiction refers to a court’s constitutional or statutory power to hear and adjudicate a certain type of case.” *D.P. v. State*, 151 N.E.3d 1210, 1213 (Ind. 2020). “When a court lacks subject matter jurisdiction, any judgment it enters is void.” *Id.*

[6] “Juvenile courts, in particular, have limited subject matter jurisdiction, as they may exercise authority over cases only as permitted by statute.” *Id.* Indiana Code section 31-30-1-1 provides that a juvenile court has exclusive jurisdiction in “[p]roceedings in which a child ... is alleged to be a delinquent child under IC 31-37.” Prior to 2021, Indiana Code section 31-37-1-2 provided that “[a] child commits a delinquent act if, before becoming eighteen (18) years of age, the child commits an act that would be an offense if committed by an adult[.]” In *K.C.G. v. State*, 156 N.E.3d 1281 (Ind. 2020), the Indiana Supreme Court held that the juvenile court lacked jurisdiction over a delinquency petition alleging that a child had violated Indiana Code section 35-47-10-5² because the

provision is clear and applies only to children; adults cannot commit dangerous possession of a firearm. Thus, K.C.G.’s alleged possession of a firearm could never be an offense committed by an adult and the State’s nominal allegation that K.C.G. is a ‘delinquent child’ because he committed a ‘delinquent act’ failed as a matter of law, meaning the juvenile court lacked jurisdiction.

² Relevant to this case, Indiana Code section 35-47-10-5(a) provides that “[a] child who knowingly, intentionally, or recklessly possesses a firearm for any purpose [other than those exempted by Indiana Code section 35-47-10-1] commits dangerous possession of a firearm, a Class A misdemeanor.”

The Supreme Court reaffirmed this holding on March 11, 2021. *See J.R. v. State*, 163 N.E.3d 854 (Ind. 2021).

[7] However, effective April 19, 2021, the Indiana General Assembly amended Indiana Code section 31-37-1-2 to provide as follows:

A child commits a delinquent act if, before becoming eighteen (18) years of age, the child commits an act:

- (1) that would be an offense if committed by an adult;
- (2) in violation of 35-45-4-6; or
- (3) *in violation of 35-47-10-5*;

except an act committed by a person over which the juvenile court lacks jurisdiction under IC 31-30-1.

(Emphasis added). As such, on the date that K.H. was stopped by Corp. Morganthaler, the juvenile court had jurisdiction over an allegation that a juvenile had committed a delinquent act by violating Indiana Code section 35-47-10-5. Given that this was the allegation at issue in this case, we conclude that the juvenile court had jurisdiction over the case.

II. Sufficiency of the Evidence

[8] K.H. alternatively contends that the evidence is insufficient to sustain the determination that he committed the delinquent act of dangerously possessing a firearm. The standard of review for reviewing the sufficiency of the evidence to support a delinquency adjudication is the same as for reviewing the sufficiency of the evidence to support an adult criminal conviction. *A.E.B. v. State*, 756 N.E.2d 536, 540 (Ind. Ct. App. 2001).

When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable factfinder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146–47 (Ind. 2007) (cleaned up). Stated differently, “[w]e affirm the judgment unless no reasonable factfinder could find the defendant guilty.” *Mardis v. State*, 72 N.E.3d 936, 938 (Ind. Ct. App. 2017) (quoting *Griffith v. State*, 59 N.E.3d 947, 958 (Ind. 2016)).

[9] In order to prove that K.H. was delinquent for committing Class A misdemeanor dangerous possession of a firearm, the State was required to prove that K.H. was a child, *i.e.*, a person “who is less than eighteen years old,” *see* Ind. Code § 35-47-10-3, and that he knowingly, intentionally, or recklessly possessed a firearm. *See* Ind. Code § 35-47-10-5. “A person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of a high probability that he is doing so.” Ind. Code § 35-41-2-2(b). He “engages in conduct ‘intentionally’ if, when he engages in the conduct, it is his conscious objective to do so.” Ind. Code § 35-41-2-2(a). “A person engages in conduct

‘recklessly’ if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result in and the disregard involves a substantial deviation from acceptable standards of conduct.” Ind. Code § 35-41-2-2(c).

“Firearm” means any weapon:

(1) that is:

(A) capable of expelling; or

(B) designed to expel; or

(2) that may be readily be converted to expel;

a projectile by means of an explosion.

Ind. Code § 35-47-1-5. In challenging the sufficiency of the evidence, K.H. asserts that the State failed to prove that (1) he was a juvenile at the time he committed the offense, (2) the firearm was dangerous, and (3) he possessed a firearm.

A. K.H.’s Status as a Juvenile

[10] At the initial hearing, which was conducted on July 27, 2021, K.H. admitted that he was sixteen years old. The formal delinquency petition, the affidavit to show probable cause, and the juvenile detention screening tool, all of which were filed before the trial court and were part of the trial court record, also listed K.H.’s date of birth as February 24, 2005. In addition, Corp. Morgenthaler, who initiated the police contact with K.H., testified that he was both familiar with and immediately recognized K.H. and knew him to be a juvenile. The evidence is sufficient to prove that K.H. was a juvenile.

B. Dangerous Nature of Firearm

[11] The United States Supreme Court has held that firearms are inherently dangerous. Specifically, the Court has held:

Three reasons, each independently sufficient, support the conclusion that an unloaded gun is a “dangerous weapon.” First, a gun is an article that is typically and characteristically dangerous; the use for which it is manufactured and sold is a dangerous one, and the law reasonably may presume that such an article is always dangerous even though it may not be armed at a particular time or place. In addition, the display of a gun instills fear in the average citizen; as a consequence, it creates an immediate danger that a violent response will ensue. Finally, a gun can cause harm when used as a bludgeon.

McLaughlin v. U.S., 476 U.S. 16, 17–18 (1986) (footnote omitted). Likewise, we have concluded that “the mere sight of a gun is sufficient to provoke a fearful response from the average citizen, who is very unlikely to wait to determine the weapon’s operability before reacting in a panicked or violent manner.” *State v. Gibbs*, 769 N.E.2d 594, 598 (Ind. Ct. App. 2002). We agree with the United States Supreme Court that a firearm is inherently dangerous. As such, K.H.’s challenge to the sufficiency of the evidence to prove that the firearm in question was dangerous fails.

C. Possession of Firearm

[12] “Possession can be actual or constructive.” *Parks v. State*, 113 N.E.3d 269, 273 (Ind. Ct. App. 2018). As the firearm was not recovered from K.H.’s person, K.H. did not have actual possession of the firearm. We must therefore

determine whether the State proved that he constructively possessed it. *Id.*

“For the State to prove constructive possession, it must prove the defendant had the intent and capability to maintain dominion and control over the contraband.” *Id.* “To prove intent to maintain dominion and control, there must be additional circumstances supporting the inference of intent.” *Id.*

[13] Corp. Morganthaler testified that when K.H. noticed and looked at him, K.H.’s hands “went to his waistband area.” Tr. Vol. II p. 32. Corp. Morganthaler explained that the way K.H. was holding his hands at his waistband drew his attention because

in the experience I have had in the six years, I’ve come across, and been involved with, and seized almost 40 guns, and arrests. And, some indications that I see from people that I’ve come in contact with that, um, may be concealing a firearm, the reactions that when I look at them and they look at me, um, instantly moving their hands kind of toward the waistband area, which is typically where, uh, a lot of the people that I’ve dealt carry a firearm. And, knowing that [K.H.] was a juvenile and he wouldn’t have a permit to legally carry a firearm.

Tr. Vol. II p. 34. When asked, Corp. Morganthaler reaffirmed that he believed K.H. had a firearm “just because of the way [K.H. was] holding his hands.” Tr. Vol. II p. 34. Corp. Morganthaler briefly lost sight of K.H. behind a building. Once he regained sight of K.H., Corp. Morganthaler instructed him to stop. K.H. did not comply with this instruction and instead started running away from Corp. Morganthaler. Corp. Morganthaler noticed that as K.H. was running,

his hands were going down to his waistband. They would come out and swing and then go back to his waistband. I also noticed too, that he had a belt on, so, my thought wasn't that he was holding up his pants, his -- in some foot chases I've been involved in, that is the case. In this case, I didn't see those pants were saggy, so, it continued to, uh, make me wonder, the fact that he was most likely carrying a firearm due to the fact that he was now running from me and that his hands kept going down to his waistband.

Tr. Vol. II pp. 40–41.

[14] Corp. Morganthaler further testified that he again briefly lost sight of K.H. “for maybe four or five seconds” when K.H. ran down an alley. Tr. Vol. II p. 41. Soon thereafter, K.H. stopped running and Corp. Morganthaler was able to take him into custody. After securing K.H., Corp. Morganthaler retraced the route K.H. had run and found a firearm in the area where he had briefly lost sight of K.H. for the second time “laying kind of in the dirt, sticks, kind of exposed, it wasn't really hidden.” Tr. Vol. II p. 44. The firearm “wasn't really under any leaves, brush, or anything like that.” Tr. Vol. II p. 68. It did not look rusty, was not super dirty, and looked like it had “been placed there recently.” Tr. Vol. II p. 69. In addition, the K-9 tracking for the odor of a fresh human scent alerted on the firearm, corroborating the other evidence that the firearm had not been there very long because the human scent had not yet dissipated.

[15] We have previously concluded that “[f]light and related conduct may be considered by a [fact-finder] in determining a defendant's guilt [and e]vidence

of flight may be considered as circumstantial evidence of consciousness of guilt.” *Clark v. State*, 6 N.E.3d 992, 999 (Ind. Ct. App. 2014). In this case, the evidence establishes that while fleeing from Corp. Morgenthaler, K.H. repeatedly reached for his midsection, an act that, based on Corp. Morgenthaler’s experience as a police officer, suggested that K.H. was in possession of a firearm. In fact, K.H. only stopped fleeing after he evaded Corp. Morgenthaler’s sight for long enough to dispose of the firearm in an area where a firearm was soon thereafter recovered. The above-mentioned circumstantial evidence is sufficient to sustain the juvenile court’s determination that K.H. possessed the firearm in question.

[16] The judgment of the juvenile court is affirmed.

Crone, J., and Tavitas, J., concur.